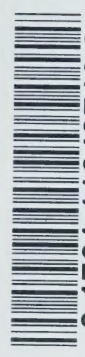


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ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY
ARISING FROM THE USE OF ASBESTOS IN ONTARIO

CHAIRMAN: J. STEFAN DUPRE, Ph.D.

COMMISSIONERS: FRASER J. MUSTARD, M.D.
ROBERT UFFEN, Ph.D., P.Eng., F.R.S.C.

COUNSEL: JOHN I. LASKIN, LL.B.

APPEARANCES:

Mr. D. Starkman	Asbestos Victims of Ontario
Mr. N. McCombie	Injured Workers Consultants
Miss L. Jolley	Ontario Federation of Labour
Mr. M. Edwards	Government of Ontario

180 Dundas Street
Toronto, Ontario
Tuesday,
July 13, 1982
VOLUME 48



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ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY

ARISING FROM THE USE OF ASBESTOS IN ONTARIO

VOLUME 48

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THE FURTHER PROCEEDINGS OF THIS INQUIRY
RESUMED PURSUANT TO ADJOURNMENT

APPEARANCES AS HERETOFORE NOTED

DR. DUPRE: Good morning, ladies and gentlemen.
This morning the Commission warmly welcomes Mr. John McDonald,
the first of a group of witnesses from the Workmen's Compensation
Board.

Before I ask that the witness be sworn in, I
gather, Mr. Edwards, you are sitting in today for Mr. Lederer?

MR. EDWARDS: That is correct, Mr. Chairman.

DR. DUPRE: And I also understand that, given some
unavoidable engagements that you have, that you would like us, if
this is agreeable, to sit until noon and resume at two?

MR. EDWARDS: If that is at all convenient, it
would be most helpful to me and to the other members of my firm.

DR. DUPRE: Fine. May I take it that there are
no great objections to proceeding this way?

MR. LASKIN: That's fine, Mr. Chairman.

DR. DUPRE: Any other matters to raise, counsel?

MR. LASKIN: We should welcome one other person to
5 the counsel table, Mr. Chairman. Mr. Wadell.

DR. DUPRE: Mr. Wadell, you are very welcome here
indeed, sir.

MR. WADELL: Thank you.

DR. DUPRE: Miss Kahn, would you swear in the
witness, please?

10 JOHN McDONALD, SWORN

EXAMINATION-IN-CHIEF BY MR. LASKIN

Q. Mr. McDonald, you are employed by the Workmen's
Compensation Board?

15 A. That's correct, sir.

Q. How long have you been so employed?

A. I am in my twenty-eighth year.

Q. What is your present position with the WCB?

A. I am executive director of the claims services
division. I have held that position since September of 1981.

20 Q. Prior to that, what position did you hold?

A. I was secretary of the board for approximately
three years.

Q. And prior to that?

A. I was director of the adjudication branch, and I
was assistant secretary of the board and director of the review
committee. I held a number of positions within the claims services
division.

Q. What are your present responsibilities?

A. I have the total responsibility for the operation
of the claims services division, which consists of the claims
adjudication branch, the claims administrative services branch and
30 the claims review branch.

5 Q. Okay. I want to ask you just a few questions about procedures for processing asbestos-related claims, and can I ask you, first of all, in that connection, whether you have had an opportunity to read the research report prepared for our Commission by Professor Barth?

A. Yes, I have read that document.

Q. Are you generally familiar with its content?

A. Generally familiar, yes.

10 Q. Professor Barth, in chapter two of that report, describes the procedures for initiating a claim for an industrial disease, an asbestos-related disease, and can I ask you, from your knowledge of this report, whether he has accurately described the process?

15 A. I think reasonably so, yes. We would receive an initial report from a variety of sources - employers, doctors.

Q. But he follows, of course, the claim all the way through from its initiation all the way through up to appeals, and does your answer hold? Has he reasonably accurately described the procedure for us?

20 A. Yes, sir. He has.

Q. Are there any qualifications or additions you want to make to that?

A. I don't believe so.

Q. All right.

25 Now, I take it that the procedures differ to some extent, depending upon whether it is a claim for asbestosis on the one hand, or a claim for an asbestos-related cancer on the other?

30 A. In the assembly of the documents, the procedure would be pretty much the same. If the individual is dead, of course, you can't get a report from the individual, but you would get a report from the widow.

Q. I'm thinking essentially of the intervention of the ACOCD in respect of asbestosis claims.

5 A. There is a difference, because not all of the cancer claims are referred to the ACOCD.

Q. Are there any...Professor Barth appears to make the point that there are some cancer claims which are referred to the ACOCD.

A. Yes, that's correct.

10 Q. All right. And are there any criteria which govern which claims get to the ACOCD, which are cancer claims?

A. There are no written criteria in that respect. It would be a medical determination. If they feel that they could benefit from the expertise of the committee, then they would seek that guidance from the committee.

15 Q. All right. Is that medical determination made by your staff doctors?

A. By our staff doctors, that's correct.

Q. And that would be Dr. Stewart or Dr. Dyer?

A. That's correct.

20 Q. Is there any reason why, generally...let me start back a bit. I take it, though, notwithstanding that, that generally speaking cancer claims are dealt with by your staff doctors?

25 A. That's correct. They would have regard for any opinions. If they felt that any further expert advice would be of assistance, they would seek that advice - whether it be from the committee or from another specialist who could offer that advice.

30 Q. Dealing with the ACOCD for just a minute, Professor Barth makes the point at the beginning of chapter four of his report that the determination...and I'm reading from page four point one...have you got his report?

5 Q. (cont'd.) I just want to check the accuracy of certain statements which he has made, and can I take you to page four point one?

That paragraph says:

10 "If a claim is made for asbestosis, the most important decisions regarding it are made by persons who are not staff or members of the WCB. Instead, the two crucial decisions - whether or not the claim is compensable, and at what level, if any, to rate it - are made by the advisory committee on occupational chest diseases. These two determinations are virtually never changed by staff or members of the WCB."

15 Can I ask you whether you agree with the statements made in that paragraph?

A. No, I don't. The role of the AC OCD is an advisory one, and it is called advisory. We would certainly seek their opinion, but the ultimate decision is made by the claims adjudicator.

20 Q. Is Professor Barth correct that the recommendations or, as he calls them - determinations, but let's call them recommendations of the advisory committee, are virtually never changed by staff or members of the WCB?

A. I would suggest there would be very few changes. I would agree with that part of the comment.

25 Q. Are you telling us, nonetheless, that there is some independent role played by the claims adjudicator? Some independent adjudication made by the claims adjudicator?

A. The adjudicator is the one who has the ultimate responsibility for making that decision and making the recommendation to the review branch to deny the claim.

30

A. (cont'd.) He would utilize the information provided by our own staff people and by the advisory committee.

I think he would be foolish to do otherwise. They are ones who have the expertise in that area. But he is the one who had to make that determination, based on that evidence.

Q. Are there any issues that the claims adjudicator would be deciding by himself without input from the advisory committee, insofar as an asbestos-related claim is concerned?

A. Exposure. In other words, when the...before the claim is referred to the medical services division and ultimately to the advisory committee, the adjudicator would have obtained all of the reports and conducted the necessary investigation to determine whether or not any exposure existed.

In effect, before it goes to the medical people that determination has been made.

Q. From what information?

A. On the basis of the information on the forms submitted by the employer, the doctor and the workman himself, and based on investigation if that has been carried out.

Q. Can we take this, just elaborate on this issue, because as you will appreciate from certainly our research report and some of the critiques that we have read, this issue appears to have been raised from time to time, and I wonder if I can ask you whether you have had an opportunity to read any of the critiques of Professor Barth that have been commissioned for us?

A. I had the opportunity to review them very briefly, but I haven't done any extensive analysis of those documents.

Q. All right. Have you looked at Professor Eissen's critique?

A. Yes, I have.

Q. Can I at least put you, or look with you at part

Q. (cont'd.) of that, and if you feel you haven't had an opportunity to...

5 A. Well, I would like to say that the Board is currently preparing an analysis of Barth and the critiques, and that will be available to the Commission at a later date, but it is not completed yet.

10 I'm sorry, I can't give you the date that it will be completed. It's a fairly comprehensive document to review Barth and the critiques themselves.

Q. But you are doing that and you will make that available to us?

A. Yes.

Q. All right.

15 In terms of claims for asbestosis, does the Board have any complete statistics on how often, if at all, a claims adjudicator or the claims review branch has departed from the recommendation of the ACOCD?

A. No, sir.

20 Q. Now, just stepping back a stage, as I understand it, again from reading Barth's study, before a claim gets to the ACOCD, a claim for asbestosis, it is in effect screened by your own medical doctors - either Dr. Stewart or Dr. Dyer, is that correct?

A. That's correct. That's correct.

25 Q. I take it that if Dr. Stewart or Dr. Dyer determine not to send a claim on to the ACOCD, that's the end of that matter, at least at that level? There would be a nonentitlement to benefits?

30 A. No, I think that the adjudicator, if he chose, could..would probably discuss the case with either Dr. Stewart or Dr. Dyer and determine why that determination had been made. That would not occur very often, I'm sure, because usually what

5 A. (cont'd.) you are into when Dr. Stewart or Dr. Dyer have made that recommendation is that the disease is not asbestosis.

Q. Has the Board ever considered doing away with the screening process, as it were, and sending all claims on to the ACOCD?

10 A. No, and I wouldn't think that that would be a reasonable thing to do, because in a lot of cases you really don't require the opinion of the ACOCD.

Q. Am I correct that in order, under your Board practices, in order to be entitled to compensation in a claim for asbestosis there must be a consideration of the claim by the ACOCD?

15 A. I would think that any claim where there is an entitlement granted for asbestosis, it would have seen the ACOCD. Yes.

Q. So that if it doesn't get there, there is no entitlement?

A. That's correct.

20 Q. Is it also correct that your board doctors can, and indeed often do, make a decision not to send the matter on to the ACOCD on the basis of whatever written material they have before them, and medical reports and so on, but in the absence of actually physically examining the claimant?

25 A. I couldn't comment on the number of cases, but that could occur that they would recommend denial of the claim on the basis of the evidence before them.

Q. Without insisting on actually physically examining the claimant?

A. Yes.

30 Q. I take it, from at least what I've read, that is a somewhat contentious issue as to whether or not a claimant

5 Q. (cont'd.) should actually physically be examined, and can I ask you whether the Board has ever given consideration to changing its practice in that regard?

A. I'm not aware of such consideration. You could perhaps ask one of the medical people in that respect.

10 Q. Now, can I ask you just in terms of this process, dealing specifically with death benefit claims, survivor claims - again, I just want to make sure we factually have the right process, and is Professor Barth correct that in the situation where there is a survivor claim and the worker was rated at less than a hundred percent so that the automatic statutory presumption doesn't apply, that entitlement is effectively considered by your staff doctors?

15 A. That's correct.

Q. It would be Dr. Stewart or Dr. Dyer who would look at the cause of death issue?

A. That's correct.

20 Q. Is that decision ever referred to the ACOCD for some input?

25 A. Not very often. Again, I don't have any figures in that respect. I think Dr. Stewart or Dr. Dyer could perhaps better comment on that.

30 Q. What information, or is this properly a question to Dr. Stewart or Dr. Dyer, but what information is before the Board in order to enable it to make an assessment as to the cause of death?

A. It would vary depending upon the individual case. You could have a copy of the death certificate, you could have a copy of the last attending physician's report, the hospital records, the autopsy report. I don't think you could make a blanket statement as to what evidence would be on file in each individual case.

5 A. (cont'd.) The initial advice that you receive regarding the cause of death might determine what additional information was requested or required. If the individual were killed in a traffic accident or something, there would be no point in getting the additional information to relate the cause of death.

Q. I'm going to come back, I want to come back to that issue...

10 A. Fine.

Q. ...but on a different point. But I'll just try and keep on the question of procedures right now.

15 Can we move one step forward from the adjudicator level to the claims review level, and again Professor Barth makes the observation that from his analysis of the files the claims review branch seldom, if ever, changes a decision made at the primary adjudication level. Would you agree with that?

A. I would agree with that. Yes.

20 Q. Then going one step further to the appeal level, he makes the observation that in fact there have been very few appeals in asbestos cases. Is that a fair statement?

25 A. We don't have any statistics on the number of appeals in asbestos cases, but I would generally agree. Yes, the first thing that you are looking at is a diagnosis of asbestosis, and that's the primary reason for rejection of most cases in this category, that the individuals do not have asbestosis. And unless that diagnosis can be established, the issue of carrying it to an appeal adjudicator or an appeal board is...I'm not sure how worthy it would be.

30 Q. That, I take it, is what you feel is probably the most likely explanation as to why there aren't a great deal of appeals?

A. In asbestosis cases. Yes. In the death cases you are getting into a little bit of a different argument as to

5 A. (cont'd.) the cause of death, and in those cases there are, I'm certain, more cases carried to appeal. But again, I don't have any statistics on the...they don't document the statistics in that manner.

DR. DUPRE: Dr. Mustard?

DR. MUSTARD: Can I ask a question about that?

MR. LASKIN: Sure.

10 DR. MUSTARD: The diagnosis of asbestosis has to be established by your advisory committee?

15 THE WITNESS: It would usually be established by the advisory committee. Now, in a lot of these cases, Doctor, the information that the Board's own medical people have received - whether it be from the specialists, from the x-rays, from the Ministry of Labour or what have you - would indicate that there is not a diagnosis of asbestosis.

20 DR. MUSTARD: Could an appeal go forward if the individual had an opinion from outside your organization, groups that said the individual had asbestosis and your own group said the individual did not have asbestosis?

25 THE WITNESS: Yes, sir. The original body, the claims review branch, once they have made their initial determination do not have any further input to the review of that claim. If an appeal is received, no matter the grounds for the appeal, it would be passed on to the appeals adjudicator to have the hearing on the case.

30 DR. MUSTARD: So a person making an appeal would then have to have been...your advisory committee has said the individual does not have asbestosis...they would have to build a case with some other outside organization that believed the individual had asbestosis?

THE WITNESS: I would suggest...they don't have to have that diagnosis. They can go on the basis of anything they wish.

5 THE WITNESS: (cont'd.) They don't have to have additional evidence to support an appeal. They can merely indicate that they wish to appeal, and that case is required to go on before an appeal adjudicator.

DR. MUSTARD: I guess what I'm saying is, that if your own advice is that they do not have asbestosis, to take an appeal forward they would indeed have to have some other outside...

10 THE WITNESS: Well, I would be looking for that to change the decision, yes.

DR. MUSTARD: And at the decision, the balance of two opinions would be made where?

THE WITNESS: By the appeals adjudicator or the appeals board, depending upon where the appeal was carried.

15 MR. LASKIN: Q. But just to follow that up, if you have that situation, you've got one opinion made by the ACOCD or your staff doctors, and let's hypothetically say that the claimant gets his own medical opinion from outside the Board and it is in conflict with either the ACOCD opinion or the staff doctor's opinion. Are you aware of any cases on appeal where the outside opinion has been given effect to?

20 THE WITNESS: A. No, I'm not. But again I would say that if the issue is that contentious as far as a diagnosis of asbestosis is concerned, it would have usually gone to the ACOCD. I am just not familiar with any cases coming forward on the basis of an incorrect diagnosis...which in effect is what the issue would have to be.

25 Q. I see. So I take it that the appeals that come forward generally, in terms of asbestosis claims, are not so much on the question of diagnosis as on the question of percentage rating?

30 A. Quantum, that's correct.

Q. Quantum.

A. Yes.

5 Q. All right. If you've got a divergence of opinion on quantum, are you aware of any cases where the Board, either the appeal adjudicator or the appeal board itself, has given effect to an outside opinion over that of the ACOCD?

10 A. I'm not personally aware of them, but I wouldn't have any occasion to examine the cases. You would have to go back and review all of the cases where an appeal adjudicator or an appeal board decision had been rendered in those cases, to make that determination.

15 Q. What has been put to us is that the opinion either of the ACOCD or your staff doctors will always prevail in circumstances where there is a conflict between an outside opinion and an internal opinion, and can you help us on whether that is true or not?

A. I'm sorry, I can't. Without having an analysis done of all the cases that have been carried to the appeals area, I could not comment on that.

20 Q. In terms of procedure, does the worker...let me start another way.

Is there ever a case where either the Board doctor or a member of the ACOCD who has, for example, examined the claimant, will be called to give viva voce evidence at a hearing?

A. No.

25 Q. Or does his opinion always go in by way of written report?

A. There are no appearances before the board in that respect. They would not be called to give evidence before the board.

30 Q. If I were a claimant, could I try to subpoena either a Board doctor or a member of the ACOCD?

A. I'm not aware of such a process having taken place.

5 Q. You are talking to someone who hasn't been through the process. Is there viva voce evidence of any sort on appeals?

A. Yes, there is. The injured worker or the employer are usually ones who would call witnesses to support their appeal.

10 If the injured worker chose to have a doctor come and present evidence on his behalf, then that would certainly be done.

Q. He could do that too?

A. Yes, he can.

Q. But the Board doctors and the ACOCD members would put their information in by way of...

15 A. In forms of reports, that's correct.

Q. In forms of reports.

DR. DUPRE: If I could just interject...this kind of viva voce testimony would take place only at the level of the appeals board, would it?

20 THE WITNESS: No, appeals adjudicator as well.

DR. DUPRE: It would take place at the level...

THE WITNESS: Appeals adjudicator and appeals board.

DR. DUPRE: Both?

THE WITNESS: Yes.

MR. LASKIN: Q. But not at the claims review?

25 THE WITNESS: A. No. The claims review is strictly a paper review of all of the documentation that has been presented to that date.

30 Q. One of the things that Professor Weiler suggested in his report in terms of claims review was that it might be a good idea in some cases where there were difficulties if the claims review branch alerted the claimant as to potential difficulties before actually issuing the decision.

Q. (cont'd.) Can I just ask you whether that suggestion has been acted on as a matter of practice?

5 A. No, it hasn't, but I would like to qualify that by indicating that when the claim is referred to the claims review branch, they have the responsibility to review all of the documentation on the record. They would not necessarily accept the recommendation coming from the claims adjudication branch. They would determine whether they felt further information was
10 required to either deny the claim or perhaps support the claim.

They would either direct that that inquiry be carried out by telephone, by correspondence, or by a local investigation.

15 They would so direct to the adjudication branch, so in effect you are carrying out part of that process by going back to try and get additional evidence.

Q. Fair enough.

20 Then can I just, finally on these questions of procedures, can I ask you what kind of response a claimant gets from the Board in a situation where, first of all, the claimant is denied benefits? What kind of...does the claimant get some kind of explanation as to the decision making process? To use a lawyer's term, does he get reasons for judgement?

25 A. Well, I guess it's a case of what you describe as reasons for judgement. The claims review branch are required to provide a written statement to the man indicating the reason for the denial of the claim.

Usually the reason will be that the disease is not a disease covered under schedule three, or the disease is not related to the circumstances in the employment - talking of this particular area.

30 In addition, they would advise the man in that correspondence of his right of appeal...the addressing the appeal

5 A. (cont'd.) to the registrar of appeals. That's the last paragraph in all of the denials coming from the review branch - it indicates you have the right to appeal this decision.

MR. LASKIN: Dr. Uffen has a question.

THE WITNESS: Yes, sir.

10 DR. UFFEN: There is a thing I am not clear on, and it's the relative to the ACOCD. There's two statements in Barth which don't seem to jive. They are on page two thirteen and two fourteen, just a little beyond halfway down page two thirteen.

It says that:

"The Workmen's Compensation Board procedures require that a worker be evaluated by the ACOCD in order to be compensated for asbestosis."

15 I believe this point has already been reviewed.

But then in the first paragraph on the next page, he says:

"Overall, twenty-seven cases involving claims for asbestosis were rejected by Dr. Stewart or Dr. Dyer, and not referred to the ACOCD."

20 Is he wrong?

THE WITNESS: He is wrong. I think that the qualification there is that twenty-seven claims were rejected. They were submitted to the board for asbestosis, but in effect that disease was not found to be present.

25 I'm not familiar with any claims for asbestosis, themselves, having been rejected. If the diagnosis of asbestosis is there, I would suggest to you that the claim has been allowed.

DR. UFFEN: But they went directly to the board? They didn't go to the ACOCD?

THE WITNESS: That's correct. That's correct.

30 DR. UFFEN: So the first statement is incorrect then?

THE WITNESS: No, it's the second statement, sir.

DR. UFFEN: "The WCB procedures require that a worker be evaluated by the ACOCD".

THE WITNESS: If he has asbestosis, sir.

MR. LASKIN: Q. You are saying that Dr. Stewart or Dr. Dyer made the judgement that these twenty-seven claimants did not have...

THE WITNESS: A. Did not have asbestosis. That's correct.

Q. But that judgement was not reviewed by the ACOCD?

A. No.

DR. UFFEN: And it went directly to the Board from that?

THE WITNESS: Yes. The determination would have been made by the claims review branch following input from the claims adjudication branch and the medical services division.

They would have advised the individual that on the basis of the evidence presented he did not have asbestosis.

If there is a diagnosis of asbestosis, that case would have been referred on to the ACOCD for opinion regarding the...

DR. UFFEN: So if I understand it correctly, if it is clearly not asbestosis, then they don't bother sending it to a board, a specialist to deal with that. But if there was some difference of opinion or judgement, it could...

THE WITNESS: I would suggest in all probability it would go on, sir.

DR. UFFEN: It probably would?

THE WITNESS: Yes.

DR. UFFEN: See, we have heard evidence about looking at x-rays and so on, where it's not always easy to tell and it takes a year or two for a condition to change

5 DR. UFFEN: (cont'd.) sufficiently that there is no difference of opinion, medically. That's a long time for some people.

So I'm right that such a decision would be made by these two staff doctors?

THE WITNESS: That's correct.

10 DR. UFFEN: And if they happen to be wrong, you wouldn't find out about it for quite a long time?

10 THE WITNESS: Well, it would depend on the re-examination of the man by his own physician, or if the man decides to make an appeal.

DR. UFFEN: I see.

15 THE WITNESS: But I would suggest that perhaps you might wish to pursue that line of questioning with Dr. Stewart and Dr. Dyer as to what process they follow before they make a decision not to refer the case on.

DR. UFFEN: Anyway, thanks. You have clarified the routing and where it can be a go or a no go.

20 THE WITNESS: I think that it is quite important to note that Professor Barth has indicated that there were twenty-seven cases of asbestosis, and that is not correct. The individuals did not have asbestosis.

DR. UFFEN: It says claims for asbestosis.

THE WITNESS: Yes.

25 DR. UFFEN: And they were rejected so the...

THE WITNESS: They did not have asbestosis.

DR. UFFEN: According to Dr. Stewart or Dr. Dyer.

THE WITNESS: Yes, that's correct, but also it is quite possible that it is in accordance with the evidence submitted on the man's behalf by his own physician as well.

30 DR. DUPRE: I want to come to that, because there is one other piece to the little puzzle that Dr. Uffen is bringing

5 DR. DUPRE: (cont'd.) to our attention, and that is on page two fourteen of Barth, but in the next paragraph. Looking about halfway down the paragraph that begins in the middle of the page, I note the following statement:

"However, in twenty-seven claims of those sampled, the case was not forwarded on to the ACOCD, apparently because of the negative report on the 8-S form."

10 If that population of twenty-seven claims is the same twenty-seven as is referred to at the top of page two fourteen, what that is telling us is that the apparent reason for not forwarding to the ACOCD is a negative report from the worker's doctor?

15 THE WITNESS: Well, that's not entirely correct because that is not the only report that is considered in the claim before that decision is made. The x-ray reports would also be there, as well as the 8-S, and possibly some other reports.

20 But again, without reviewing those twenty-seven particular files that Professor Barth is talking about, I really couldn't comment. But it is not solely on the basis of a negative report on 8-S. No. It's an evaluation of the total claim.

DR. DUPRE: Dr. Mustard?

25 DR. MUSTARD: Can I pursue this a bit further, because if we go over to two fifteen there is an added complication to this?

30 On reading through Barth's report, one is left with the impression...and I have to say this as a physician... there is enormous uncertainty in medical diagnosis and medical treatment that we are always faced with...one is left with the impression that if the outside physician's report states this individual has asbestosis, that because of the problems of making

DR. MUSTARD: (cont'd.) that diagnosis it would be referred to the advisory committee in almost all cases?

5 THE WITNESS: I would think if there was a diagnosis by the outside physician that it would be referred on to the AC OCD, but again I would suggest you should address that to Dr. Stewart and Dr. Dyer.

10 DR. MUSTARD: But then on the other side, if I'm an outside physician and, recognizing my lack of experience in asbestosis, I say you have chronic bronchitis, which is a kind of catch-all phrase that is sometimes used, and that came in on an 8-S form, the case might not get referred to the advisory committee even though in a sense the same principle is there as to what the problem is. Am I right?

15 THE WITNESS: It would depend on the evaluation of the other documents by Dr. Stewart and Dr. Dyer.

DR. MUSTARD: But they would review the individual who comes in with a diagnosis of asbestosis by the physician, that gets referred to the advisory committee?

20 THE WITNESS: Yes.

DR. MUSTARD: I guess my question is, wouldn't it make sense to refer them all to the advisory committee just to ensure that the uncertainty principle is handled by the expert group?

25 THE WITNESS: Well, I think that you have to consider that both Dr. Stewart and Dr. Dyer are also expert in reviewing the x-rays and the other documentations.

30 DR. MUSTARD: I guess my question is, and we can ask them the question, if it comes in with a diagnosis of asbestosis it does tend to get almost always referred to the advisory group, and that's the problem I'm having with the report on pages two fourteen and two fifteen.

I'm right in my perception?

THE WITNESS: Yes. I would suggest that if that does occur, it would be referred. Yes.

DR. DUPRE: Mr. McDonald, could I just, if you please, continue looking at page two fourteen, with you, to make sure at least that I understand what is going on from a public administration point of view?

When you made the point in reference to Dr. Uffen's question that the sentence, "Twenty-seven cases involving claims for asbestosis were rejected by Dr. Stewart or Dr. Dyer and not referred to the ACOCD", what was the point that was wrong in that sentence?

THE WITNESS: They were not diagnosed as asbestosis. They were submitted to the Board as cases of asbestosis, but were not found to have asbestosis.

DR. DUPRE: Oh, yes, but the sentence reads 'claims'?

THE WITNESS: Well, it's a claim for asbestosis, I guess. It's a case of how you regard it. All I am suggesting to you is that the findings on the record, I have not seen a claim for asbestosis itself which has been denied.

DR. DUPRE: A validated claim for asbestosis?

THE WITNESS: Right. Right.

DR. DUPRE: Okay. But of course a claim could be invalid. You never get to validate a claim, one way or the other, unless you have been presented with one, isn't that correct?

THE WITNESS: Okay, I'll accept your statement, but again I would have to suggest that I have not seen a case where a diagnosis of asbestosis has been made that has been denied... where the exposure requirements are met.

DR. MUSTARD: Can I just...the diagnosis has to be made by your advisory committee or your two physicians, your two

DR. MUSTARD: (cont'd.) staff physicians?

5 THE WITNESS: Not necessarily. It would be confirmed by them, but it could be made by the man's practicing physician.

DR. MUSTARD: Okay, it has to be confirmed by them?

THE WITNESS: Yes.

10 DR. DUPRE: Just one other point looking at that sentence from a standpoint of public administration. I questioned in my own mind whether the sentence was accurate, because at one stage of the game I asked myself, shouldn't the accurate rendering of what goes on in the Board be that a claim for something was rejected by the claims adjudicator, as distinct from the medical staff member who is cited by Dr. Barth here?

15 THE WITNESS: The ultimate decision to deny these claims was made by the claims review branch...now, depending upon what date these decisions were made, because of the structure of the Board changing in that respect and it might have been made by an adjudicator if they were older claims.

20 DR. DUPRE: Now, counsel, if you will permit me, you may have this on your mind downstream, but at one stage of the game or another while Mr. McDonald is good enough to be with us, I, of course, would very much appreciate a little organizational sketch that would enable me to appreciate the position of the claims review branch where, I presume, the claims adjudicators are to be found....

25 THE WITNESS: No.

DR. DUPRE: The medical branch and so on...

THE WITNESS: Right off the bat, you are wrong.

DR. DUPRE: Okay. Well, then, you see how badly in need I am of an organizational sketch, but I don't want to...

30 MR. LASKIN: Let's have Mr. McDonald do that, if he can help us with that.

DR. DUPRE: We can provide you with...

MR. LASKIN: Crayons.

DR. DUPRE: ...in many colors.

DR. UFFEN: And a board.

THE WITNESS: All right. I previously stated in response to counsel's request what my responsibility was, and that has to do with the claims adjudication branch, the claims administrative services branch and the claims review branch.

The claims adjudication branch, somewhat over four hundred in number, is made up of...

DR. DUPRE: You are going a little bit too fast for me and I would have liked you to sketch it yourself, and then you have these, I gather, three branches under you, that I have just missed?

(REPORTER'S NOTE: At this time the witness produced the requested organizational chart.)

THE WITNESS: First of all, I'll deal with this one - the claims administrative services.

It is primarily an information processing branch. Our investigation staff would be assigned here, but any work that is carried out here would be referred by the claims adjudication or the claims review branch. They do not have a decision-making function. They are a service group. The telephone answering services is in there, our payment processing people are in there, but it's a service function, so I won't deal with that one in particular.

MR. LASKIN: Q. Are they responsible at all for collecting any information when a claim is first filed?

THE WITNESS: A. Not when it's first filed. I'll come back to that aspect.

Within the claims adjudication branch you have

5 A. (cont'd.) the extended disability sections, to deal with claims for compensation where there is lost time beyond thirteen weeks of claim life, or where there is some question about the initial adjudication.

DR. DUPRE: And that is called what again, extended...?

THE WITNESS: Extended disability.

It's somewhat of a misnomer, but..

10 DR. DUPRE: So that basically, therefore, involves any claim that would have had a time loss greater than thirteen weeks?

THE WITNESS: Yes.

I'm not the greatest artist.

15 Okay, no-lost-time claims: That's where the individual claims an accident at work where there is no lost time beyond the day of the accident.

There are medical aids benefits to flow - a man might have broken his glasses, lacerations, goes to the hospital, goes to the doctor, immediately returns to work. There is no lost time beyond the day of the accident.

20 Approximately sixty percent of our claim volume falls into this category. There is no lost time.

Primary adjudication section: When an employer's report of accident is received at the Board, it is immediately reviewed to determine whether it falls into the no-lost-time category or the lost time category.

25 If it's lost time, the claims adjudicators would review that document to determine whether or not, on the basis of a review of that form, benefits can be paid.

30 If they can be paid, they will signify on the document the nature of the injury, the fact that the claim is allowable, and what period of disability should be paid in the initial payment.

5 THE WITNESS: (cont'd.) Then the claim is referred on to our records branch to determine whether there has been any prior documentation setting up that claim, and the payment is authorized at the same time as the claim is established, so that in effect when the claim documents go to the man, the payment document goes to the man as well, and a notification to the employer confirming the receipt.

10 Now, this can be done on the basis of an employer's report of accident or a doctor's report of accident. If it looks like there is a clear-cut history of accident, the claims adjudicator will make a determination that it appears on the basis of the documentation on the record that that claim can be allowed.

15 Now, if there is any question in the primary adjudicator's mind, he will indicate that some inquiries should be made. In that case, it goes to the extended disability section where they will initiate that inquiry.

20 There are ten sections in this area, and that is determined by the terminal digit. All claims ending in the terminal digit zero are handled in section ten.

These are the accident claims, and the industrial disease claims such as dermatitis.

25 ID and D section, industrial disease and dependents, is a section established solely to deal with the other industrial disease claims - silicosis, asbestosis, industrial deafness. There are eight adjudicators, two team co-ordinators and a supervisor.

DR. DUPRE: Could I first of all just ask you, what does that second D stand for in ID and D?

30 THE WITNESS: Industrial disease and dependents. We used to call it fatals, but when somebody phoned and they were alive and they said fatal section, it rather upset them so we changed the name to be more reflective, because in a fatal

THE WITNESS: (cont'd.) claim you usually have a dependent.

5 DR. DUPRE: Before you go on, I'm very slow here and I just want to make sure I understand a couple of things you have already said.

THE WITNESS: Do you want me to use that mike?

THE REPORTER: If you could move it just a wee bit closer, please.

10 THE WITNESS: Okay.

DR. DUPRE: Now, could you run the role of the primary adjudication box past me again?

THE WITNESS: Okay.

15 When the form seven, which is an employer's report of accident, or the form eight which is the doctor's report of accident, is received in the Board, it is immediately referred to the primary adjudicator if there is an indication that there is lost time.

DR. DUPRE: If there is any indication that there is lost time, beyond the day of the accident?

20 THE WITNESS: Beyond the day of accident. That's correct. Okay?

DR. DUPRE: That's what I wanted to make clear. Otherwise it would have gone to the no-lost-time square..

THE WITNESS: That's correct.

25 DR. DUPRE: ...automatically, without hitting the primary adjudication box?

THE WITNESS: That's correct.

DR. DUPRE: So at this point, primary adjudication sorts out, basically...

30 THE WITNESS: Those claims which can be allowed on the basis of the employer's report. The man has had an accident, he has reported to the employer, he has gone to the doctor, he is

5 THE WITNESS: (cont'd.) off work, there is an indication that he is going to be off work for a week or ten days, or beyond that even. They will authorize the payment at the same time as they establish the claim. They refer it onto the records for document check for number verification and so on. There is no claim number assigned at that point in time.

10 Once the records people have determined the claim number and assigned it to the documents, it returns back to primary adjudication if there is an indication that it is going to be a reasonably short-term disability...I said less than thirteen weeks.

15 The majority of the cases that fall into this area, the man is off work, back to work in less than thirty days...you've got a broken finger, a laceration or what have you, he is going to be off for a week or ten days. Those are the claims that are handled in this area.

20 Now, if on review of the initial document the adjudicator feels that the man has returned to work, he will phone the employer, confirm a return-to-work date and make the total payment on the basis of that form without receiving any other documentation from any other person.

25 No report is requested from the injured worker. It's just a case of allow the claim, it is paid, there is no medical report received, it's paid. It's a good accident history with a period of disability which appears to be reasonable for the accident reported, and then it goes back to the...in effect, the final file.

30 The medical aid payments are subsequently processed against the computer record rather than against the claim form itself.

DR. DUPRE: Now, to get to the extended disability box, you have to have hit the primary adjudication box first?

5 THE WITNESS: That's correct. They will have made a determination that some inquiry is needed in that claim, whether the employer has questioned the accident history, there is a third party involved - it could have been a traffic accident, that type of thing. Some inquiry is needed.

10 Or, it's clear to the primary adjudicator that that claim is going to go beyond thirteen weeks. If it had been a fractured femur, it could have been a paraplegic, could have been severe burns, he knows that he is not going to continue to handle that claim. He would refer it there, but the adjudication decision could have been made to pay the benefits, and the continuing benefits would fall here rather than here.

15 DR. DUPRE: Incidentally, if there was a claim, for example it could have been a traffic accident, as you put it, on which the primary adjudication branch would need more information, that would go to the extended disability as well?

THE WITNESS: To make the inquiry, that's correct.

20 DR. DUPRE: So extended disability is basically a long-term claim plus an inquiry?

THE WITNESS: An inquiry, that's correct.

DR. DUPRE: Which could be actually shorter as well as longer?

25 THE WITNESS: That's right. That's right. You could have a period of disability of only a week, but it would still go in there. That's why I suggested it was somewhat of a misnomer.

DR. DUPRE: Okay. Thank you for clearing that up.

THE WITNESS: I don't think it's necessary to get into this particular section unless you wanted some explanation. When the condition is static, it would be referred to the pension section to evaluate that.

30 DR. DUPRE: Just in the interest of having the whole kindergarten course, can you just fill out the pensions box for us?

THE WITNESS: Okay.

5 Say you've got a claim in the primary adjudication area where the man may have received an amputation of the terminal digit of his finger. It's a short period of disability and the man is back to work. In many instances there is very little lost time related to that, but there is a permanent disability which has to be recognized.

10 The adjudicator would then refer the claim to the pension section to consider the amount of the permanent disability. The same thing in extended disability, only you get into a longer term where the individual has been off work for some period of time, it is determined that the condition is static, he may or may not have returned to work. The case would be referred to the pension section to determine when the evaluation of the pension condition should take place.

15 DR. DUPRE: Let me see if I understand this.

You go from the primary adjudication box straight to the pensions box, say for a minor disability such as one arising from the loss of the little finger?

20 THE WITNESS: Yes, sir.

DR. DUPRE: Where does the loss of an arm...

THE WITNESS: Well, it would be in the extended disability section.

DR. DUPRE: That would go to...

25 THE WITNESS: Right off the bat, the primary adjudicator who would have allowed the claim would refer the claim on to extended when the condition is static, then they would refer it to the pensions section for consideration.

DR. DUPRE: Okay. Great.

30 THE WITNESS: Okay? ID and D...eight adjudicators, two team co-ordinators and a supervisor. They have the responsibility for assembling all of the claims related to

THE WITNESS: (cont'd.) industrial disease and all fatalities.

5 DR. MUSTARD: It would go...any claim that was related to industrial disease, then, would not go to the primary adjudications section first?

THE WITNESS: No, sir. Usually it is identified by the diagnosis, and as soon as that diagnosis appears on the report, it would be referred to ID and D.

10 Now, it's a possibility it could be sent up here because the diagnosis isn't recognized initially, but as soon as it was diagnosed it would be then referred to that section. But they would be in the minority.

15 DR. MUSTARD: Just to question that, if an individual had an accident which may, say, burn their hand and they got a secondary infection that caused a lot of major complications, would that get transferred across or would it stay right there?

THE WITNESS: Well, depending, again, on how long. If it would go beyond thirteen weeks, it would get referred on.

20 DR. MUSTARD: But infection as a result of an accident would stay on this side?

THE WITNESS: Stay here. Sure.

DR. MUSTARD: But the things you have defined as industrial diseases skip over to that box?

THE WITNESS: Right over to here. Yes.

25 DR. MUSTARD: All cancers would automatically go there?

THE WITNESS: Yes, sir.

DR. UFFEN: What about the case of something that is diagnosed as bronchitis? Would that go to ID and D?

THE WITNESS: ID and D. Yes, sir.

30 DR. UFFEN: And somebody in primary, when they saw

DR. UFFEN: (cont'd.) bronchitis, would automatically go over to the other side?

5 THE WITNESS: I think they are all referred there, yes.

DR. DUPRE: Indeed it might even get to primary, because there seems to be a mail-sorting situation.

10 THE WITNESS: Well, bear in mind that usually if you have got an industrial disease situation, it's coming in on a different report. Like the 7-S from the employer, or the diagnosis on the report from the doctor would trigger the route that the claim would follow.

DR. UFFEN: We are looking at an organizational chart, but we are talking about a flow diagram.

15 THE WITNESS: Yes. I can provide the members with our organizational chart. I'm sorry. It should have been here.

DR. DUPRE: Just one other question to make sure it's clear in my mind.

20 Do I take it, then, that extended disability deals only with extended disability arising from accidents?

THE WITNESS: From trauma. That's right.

You could have a dermatitis condition which in effect is an industrial disease, but it would be handled here because there are a substantial number of them and the same expertise is not required.

25 You also have a bursitis or a tendonitis, something that is due to repetitive movement, which would be handled in this particular area as well.

MR. LASKIN: Q. What kind of training or qualifications do your adjudicators in ID and D have?

THE WITNESS: A. Can we come back to that?

30 MR. LASKIN: We are going to come back to it.

DR. DUPRE: Yes. And I just take it though, at the

DR. DUPRE: (cont'd.) moment, that we have established that in ID and D one finds eight...

THE WITNESS: Eight adjudicators. That's correct.

DR. DUPRE: Okay. And now I guess counsel is interested in their kind of training.

THE WITNESS: When a claims adjudicator joins the Board, they are initially referred through our training section. They receive twelve weeks of training on adjudication.

They would then be placed in either the primary adjudication area, or extended disability area, and they would remain there for a period of time and then they would be transferred to one of the other areas.

Generally speaking, the majority of the adjudicators in the no-lost-time section would have moved up from clerical positions within the Board. We don't start very many of our claims adjudicators who eventually end up in primary or extended in the no-lost-time area.

You require, I would suggest, somewhat lesser expertise to deal with the more minor claims, and we have found that it flows better with a more consistent body of adjudicators remaining in that area. It's a smaller group of adjudicators... I think there's about fourteen, who deal with tremendous volume, but no disability.

MR. LASKIN: Q. In terms of ID and D, where do they...?

THE WITNESS: A. Usually the person would have been with the Board for, I would suggest one to two years, functioning as an adjudicator within one of the other sections - either primary adjudication or extended disability - before they are referred down to ID and D as a part of their ongoing upgrading.

Could I ask Ray, who is the supervisor?

MR. RANTA: Approximately three months within the section for further training.

THE WITNESS: Yes. After they hit the ID and D section they receive an additional three months training...

MR. RANTA: Three months of training within the section.

THE WITNESS: Before they go on their own.

So you would be generally looking at a person who has been with the Board for...Oh, I wouldn't think you had too many in there who had been less than two years. The last couple who have gone in there have been through primary, extended and pensions before they have gone to ID and D, so I would say they are more four to five year employees before they hit that particular area.

MR. LASKIN: Q. All right. Perhaps you can complete the organization chart?

THE WITNESS: A. The ID and D adjudicators have the responsibility for assembling the claim file to determine entitlement for the particular disease which is being claimed.

They would do this through sending forms to the man, to the employer, to the doctor, receiving those forms back and then making a determination whether or not the evidence on the forms was sufficient for them to make a recommendation to either allow or deny that claim.

If they feel that further inquiry is necessary, they can utilize the services of the investigation staff who work in the claims administrative services branch.

Now, these investigators are located not only in Toronto, but throughout our area offices in the province - Thunder Bay, Hamilton, Windsor, Kitchener, there are a couple of regional offices in London and Sudbury, which is a little different, but again, the investigation work would be done by them of claims that emanate for that particular area.

There is also a possibility of utilizing the mine register records. Where the man may have been a transient type of

5 THE WITNESS: (cont'd.) employee, he is required to work with a mining certificate. Then that documents what mine he has worked in for what period of time, and that is recorded in our statistical services area, and they would ask them for confirmation of the individual's work history.

10 When all of that information has been assembled, again the adjudicator would make a recommendation to the appropriate medical staff as to whether or not the criteria for the adjudication acceptance has been met, i.e. that the man has been a resident of Ontario in accordance with the provisions of the Act, and it varies depending upon the nature of the disease.

15 Section 122 has certain residence requirements for some diseases.

20 They would make a recommendation to the medical services branch - either Dr. Dyer or Dr. Stewart would review that documentation if you are talking about a silicosis or an asbestosis claim. Industrial deafness, it goes to another physician but it's the same basic process.

25 DR. DUPRE: Maybe just before we get to the medical services division, I want to make sure I understand the kind of information that an ID and D adjudicator would seek to get confirmed by the claims administration branch.

30 Now, would the kind of information for which he would seek confirmation include whether the employee was in an occupation that exposed him to a hazardous substance?

THE WITNESS: Usually what you are into is...say for example the claim came from Johns-Manville...you would not normally be investigating that type of claim. Johns-Manville have the documentation as to where that individual worked within their company and they would provide you with that information.

35 In the claims administrative services area you are getting into the case of an installer or a boiler maker, or

5 THE WITNESS: (cont'd.) what have you, where the man is a transient employee, in effect, worked for many employers and you really can't establish which employer he worked with where the exposure took place.

10 So in that case, they would be contacting the man, contacting his union, to try and make a determination as to exactly where his exposure took place and how long he was employed in the various areas.

15 DR. DUPRE: And the 'they' who would be doing that are the claims administration people, or would it be...?

THE WITNESS: No. The claims administration on the basis of the recommendation from the ID and D adjudicator.

DR. DUPRE: Would be doing the contacting?

15 THE WITNESS: Yes.

DR. UFFEN: Could I ask a somewhat similar question in that box? I'll go back to the bronchitis example.

20 Suppose the adjudicator has got in front of him documents - one says bronchitis and the other says asbestosis. What does he do?

25 THE WITNESS: Well, he would again get all of the exposure data before referring that claim on to our medical people for determination.

DR. UFFEN: Does he have the power of judgement as to whether it goes to the medical people or not?

THE WITNESS: Yes, he would have that.

30 DR. UFFEN: So it's a no-go situation. If he makes a mistake...

THE WITNESS: But I would suggest to you that he would not normally be recommending denial if there was any suggestion of a chest disease and the exposure criteria was met.

DR. UFFEN: Not normally, but the fact of the matter is, as I think I understand...

THE WITNESS: Well, if it went to the review branch...

DR. UFFEN: If he has these two pieces of paper in front of him, he makes the judgement as to its future routing?

THE WITNESS: Yes. But if he routed it to the review branch, which we haven't approached yet, I'm sure they would refer it back for medical opinion. But I just can't see them sending it that way.

DR. UFFEN: I can understand if it he routes it to claims, he routes it to claims review or he routes it to medical. What I'm wondering about is when he doesn't route it anywhere.

THE WITNESS: He can't. He cannot make a decision to deny on the basis of that documentation. It has to be done by the claims review branch. We haven't got there yet.

DR. UFFEN: Thank you.

THE WITNESS: Okay?

DR. UFFEN: Okay. That's the point.

THE WITNESS: Now, when the information is assembled, they would refer it to the medical services division - either Dr. Stewart or Dr. Dyer. They would review the documentation and advise the adjudicator whether or not the criteria was met as far as the disease was concerned, and those are the cases that I would suggest to you that Professor Barth was talking about...there was, in the opinion of Dr. Stewart and Dr. Dyer, based on their review of documentation, no diagnosis of asbestos, no evidence of asbestosis. They would refer it back to the adjudicator with their opinion on the file.

The adjudicator would then review that documentation and refer it on to the claims review branch. He cannot deny the claim himself. He can make a recommendation to deny. He would refer it to the claims review branch. They would then be charged

5 THE WITNESS: (cont'd.) with reviewing all of the documentation on the record. If they feel that there is further inquiry needed, either in terms of exposure or in terms of diagnosis, then they would request that that additional inquiry be carried out. Then they would make the determination that the man does not have entitlement, and they would communicate that decision to the man, advising him the reason for the denial of the claim.

10 DR. DUPRE: I guess the only thing I am interested in at this point is that we go at this slowly. Let me put it to you this way: I still need, at this point, my...I've gotten a very, very useful introduction to the claims adjudication branch and its various sections.

15 Now, I still need to shake hands in the most preliminary sort of way with claims review.

THE WITNESS: Okay.

20 There are a staff of approximately fifteen claims review branch members. I would suggest the majority of those people have come through the ranks of the claims adjudication area, have held a variety of positions up to and including supervisor of one of the extended disability or primary adjudication sections. I don't think you would have many in there who haven't got fifteen to twenty years experience in the adjudication process.

25 When the claim file is referred to them, they are charged with the responsibility of reviewing all of the documentation which has been obtained by the claims adjudicator and by the medical services people, and then making a determination regarding entitlement, or directing that further inquiry be carried out.

30 Now in some instances, this claim would have already been referred to the advisory committee, and the advisory committee report would have come back...

DR. DUPRE: Which is the...

THE WITNESS : If the medical people have examined...

5 DR. DUPRE: Oh, yes. But see, that's much too fast
for me. That's much too fast.

I'm still away back in square one, and I want to ask
you this: can I take it that all claims that have passed through
the hands of claims adjudicators in ID and D wind up going to
claims review?

10 THE WITNESS: Only those claims where a rejection
is being recommended.

DR. DUPRE: Only those claims where rejection
is being recommended?

THE WITNESS: That's correct.

15 DR. DUPRE: And is the same thing true right
across the board, namely that primary adjudication or extended
time claims...

THE WITNESS: If they are recommending denial,
then that claim would be referred to the review branch.

DR. DUPRE: So any claim on which denial is being
recommended winds up going...

20 THE WITNESS: To the review branch. That would
also include a case from pensions where the pensions adjudicator
has made a determination on quantum...I'm not talking about ID and
D, I'm talking about trauma...he would have made a decision on
quantum, the man objects to the quantum award. If he makes that
objection when it comes back, the pensions adjudicator who made
25 that determination would refer the claim to the claims review
branch who would review the decision and communicate that decision
to the man.

DR. UFFEN: Would that include degree of disability?

30 THE WITNESS: Yes, sir. Yes, sir. Where the
man objects to the quantum, then it would go through the claims
review branch.

5 DR. DUPRE: Now, just nibbling at your tasty cookie crumb by crumb as I am wont to do, I understand now how a claim can go from ID and D to the claims review, and that is basically if the adjudicator at ID and D has recommended...

THE WITNESS: He has recommended denial of the claim.

DR. DUPRE: Recommended denial.

10 THE WITNESS: That's correct.

DR. DUPRE: That is the only way in which a claim can move from ID and D to claims review?

THE WITNESS: No. The employer may have objected to the allowance of the claim.

15 DR. DUPRE: Or the employer may have, so there are two sets of circumstances but I can take it that only two, that will cause a claim to move from ID and D to claims review?

THE WITNESS: That's right. Yes, sir.

MR. LASKIN: Q. Or the employee objects to a percentage rating?

20 THE WITNESS: A. Yes. Yes, the quantum issue also goes there.

Q. So it's number one, entitlement; and number two, quantum from the employee's side; and number three, allowance from the employer's side?

A. That's correct.

25 They fall into the minority, employer's objections.

DR. UFFEN: I've got a minor question about the routing. When it goes from ID and D to claims review, does it go through somebody who is the boss? In the box you have drawn there...

30 THE WITNESS: It would normally have gone through the team co-ordinator. The claims adjudicator would make a

THE WITNESS: (cont'd.) recommendation...

5 DR. UFFEN: What I mean is, does it route back up through somebody who is called supervisor of claims adjudications and then over to claims review, or does it go from ID and D to claims review?

10 THE WITNESS: No. I think I mentioned that there were eight adjudicators in the ID and D section, and two team co-ordinators. All of the recommendations for denial would go through the team co-ordinator before they get to the review branch.

Now, that same co-ordinator may overrule the adjudicator or may direct that further inquiry take place before it goes on to the review branch.

15 DR. UFFEN: Now, there are two of them. Do they divy things up - one responsible for one kind of operation...?

THE WITNESS: No, no. They have four adjudicators that they have responsibility for, and the claims from those four adjudicators would flow through one, and four through the other.

DR. UFFEN: Do they specialize, I mean?

THE WITNESS: No.

20 DR. UFFEN: They don't specialize...like, I'm good at assessing problems and you are good at something else?

THE WITNESS: No. No, sir.

DR. UFFEN: No?

THE WITNESS: No.

25 MR. LASKIN: Q. I take it in terms of the three kinds of cases that get claims review, a denial of entitlement gets there automatically and the worker doesn't have to do anything?

THE WITNESS: A. That's correct.

Q. It gets there automatically?

30 A. There cannot be a denial by the adjudication branch. It has to be confirmed by the review branch.

Q. But when we are talking about the other two

5 Q. (cont'd.) circumstances - that is, an objection to quantum or an employer objection, they have to be triggered by the employee or the employer?

A. That's correct.

10 DR. DUPRE: And presumably how that has been triggered is that an adjudicator in ID and D has allowed the claim, whereupon the employee is notified and the employer is notified, and it is at that stage that either the employee will...

15 THE WITNESS: I would suggest to you that most of the claims flowing from the ID and D section, any objection from the employer flows from the charging of the claim...i.e., the man has only worked with that employer for a comparatively short period of time, and he is suggesting that the claim should properly be charged to some other employer. That is the primary reason for an employer objection.

I would think that in the ID and D area there would be very, very few claims where the employer is objecting to the allowance of the claim per se. It can occur.

20 DR. MUSTARD: A question just to help me through this kindergarten course because I'm not quite at his level, the adjudicator from ID and D recommends. Recommends to his supervisor?

THE WITNESS: No. He recommends to the claims review branch that the claim be denied, but it flows through the team...

25 DR. MUSTARD: What if he recommends approval?

THE WITNESS: He approves it on his own.

DR. MUSTARD: I see.

THE WITNESS: He can approve it on his own, but he cannot deny it.

DR. MUSTARD: So he has the power to approve?

THE WITNESS: That's correct.

30 DR. MUSTARD: And is not accountable in a sense to

DR. MUSTARD: (cont'd.) anybody? He makes that decision? Not even to the supervisor?

THE WITNESS: No, sir.

Normally he would have had input from the medical services division on the allowance of that particular claim. He wouldn't allow an asbestos claim, he would refer it to medical to get the input from medical and from the ACOCD.

MR. LASKIN: Q. Just one thing I'm not clear on. If an employee objects to a percentage rating, if he voices that objection by way of indicating he wants to appeal, does it nonetheless go to the claims review branch as an initial level of appeal?

THE WITNESS: A. That's correct. And then again when the...

Q. There is no hearing at that level?

A. No, there isn't.

Q. It's just reviewed internally?

A. If the review branch confirms the quantum, then that decision would be communicated to the man and he would be advised of his right of appeal, and then you would be into the appeals adjudicator or appeal board hearing.

DR. UFFEN: Do you mind if we just pursue the claims review just a little bit, because we are making such good progress? You said there were fifteen people in there. Now, fifteen people must have some kind of internal structure. Do they, or do they all run around separately?

THE WITNESS: No, the claims are assigned to them on a case load volume. They wouldn't continually deal with the same claim number.

In the sections I mentioned that the terminal digit is the keynote, but to avoid the same claims review branch dealing with the same people all the time, we structure it so that they

5 THE WITNESS: (cont'd.) receive their claim flow from all ten sections, from primary adjudication, from pensions, from no-lost-time and from ID and D. So they are not seeing the same claims all the time.

DR. UFFEN: Do they have a boss?

THE WITNESS: There are three senior review branch people, and there is a director of the claims review branch.

10 DR. UFFEN: A total of fifteen? I mean, the fifteen includes the director and the...?

THE WITNESS: The number...I would have to check the specific number. The total number of people in the review branch is twenty-two. Now, some of those are clerical staff.

15 There is, I think, five typists and one secretary, and the balance are adjudication personnel.

DR. UFFEN: Now, within that twenty-whatever group, do they have a little internal review when they come across a difficult problem sometimes?

THE WITNESS: Yes, they do.

20 DR. UFFEN: So they have a little review committee of their own?

THE WITNESS: Yes. The senior review branch people that I talked about where there are three, they would refer the case on to that person if they felt it would be of assistance to them.

25 DR. DUPRE: I'm not sure, but I think that I am now ready...unless counsel or my colleagues think otherwise...but I think I'm now ready to try to understand, at this point, where the medical services division fits in.

THE WITNESS: Okay.

30 In the ID and D cases that I talked about, with referral to the review branch, if the claim has been referred to

5 THE WITNESS: (cont'd.) the medical services division - which in the majority would be asbestosis claims or conditions that they had been referred...it's possible that on review of the documentation the medical people would have felt that opinion from the ACOCD was required.

10 DR. DUPRE: Before we get there, can I ask you...I've got a prior question. Where would I locate the medical services division if I was looking at a chart?

15 THE WITNESS: Well, there is an executive director of medical services as well, in a comparable position to mine, who has the responsibility for the medical services branch, the hospital rehabilitation center, the medical aid services branch.

20 DR. DUPRE: Now, can we then perhaps just catch that in quickly? In other words, in a box next to the one that we have JFM in? And that box, incidentally, would be executive director...

THE WITNESS: Claims services.

DR. DUPRE: Claims who?

THE WITNESS: Claims services division.

25 DR. DUPRE: Claims services division?

THE WITNESS: Yes.

DR. DUPRE: I would now find a box, another box at that level, which is the executive director...

THE WITNESS: Okay. Dr. McCracken is the executive director of the medical services division.

30 DR. DUPRE: Medical services division. Okay.

THE WITNESS: Under Dr. McCracken you have the director of medical services, you have the director of medical aid. They have the responsibility for paying all of the medical aid accounts which are received by the Board, the medical aid processing function.

You have the hospital and rehabilitation center,

THE WITNESS: (cont'd.) where you are dealing with the trauma cases - the hospital out at Highway 400.

Under Dr. McCracken's auspices as well, you have the industrial disease group of Dr. Dyer, Dr. Stewart reviewing chest disease claims; Dr. Hailey and Dr. Thacker who deal with the industrial deafness claims.

DR. DUPRE: Is that industrial disease group, the fourth box, on the same level as the director of medical services, medical aid and hospital and rehabilitation?

THE WITNESS: Charles, do you report through Dr. Dowd, or direct to McCracken?

Through Dr. Dowd.

DR. DUPRE: Oh, so that is down under the director of medical services?

THE WITNESS: That's correct.

DR. DUPRE: And that is called the industrial disease group?

THE WITNESS: Yes. Those are the chest diseases and industrial deafness cases, and there are a couple of others in there...Dr. Burton, I guess that's the basic one.

Again, Dr. Dyer and Dr. Stewart would fall into this category.

DR. DUPRE: And there seems to be another box.

THE WITNESS: That's industrial deafness.

DR. DUPRE: That's deafness.

Incidentally, are there other things under the director of medical services, than industrial disease and deafness?

THE WITNESS: Yes. You have all of the pensions medical advisors come under him, and all the section medical advisors. Each of these sections...and this one as well...have medical advisors located right in the section. So they can go in and talk to the doctor about all the cases that flow in that area.

5 THE WITNESS: (cont'd.) In effect, you have a similar chart under the director here as you do under the director here. He has a doctor who has responsibility for no-lost-time claims, two doctors for primary adjudication, ten doctors for extended disability...I guess there's about seven or eight for pensions and four for ID and D. So in effect you have a comparative chart for medical services as what you have for the claims services.

10 DR. DUPRE: To take a very simple analogy, I have the feeling that I am looking here at something very similar to a legal counsel in Ontario ministries, who are in the...under the Attorney-General, but serve those respective ministries of the government, and as in that situation, here what we are looking at are medical professionals who are under the director of medical services but are assigned...

15 THE WITNESS: That's right.

DR. DUPRE: ...in terms of their duties...

THE WITNESS: To the various claims areas.

DR. DUPRE: ...to the various branches of the claims...

20 THE WITNESS: Services division.

DR. DUPRE: ..adjudication division?

THE WITNESS: Claims adjudication, right. Claims adjudication branch, sorry.

DR. DUPRE: Claims adjudication branch.

25 THE WITNESS: Now, I don't want to confuse you, but we are in the process of reorganizing the claims adjudication branch, so the chart that you will get will reflect the new organization rather than this one, so there will be a little difference from what you are seeing there. I'm sorry, but we are right in the middle of that.

30 DR. DUPRE: Please don't be sorry.

THE WITNESS: The basic principles will be the same.

5 DR. DUPRE: We do appreciate, of course, that we will want to be writing a report that takes account of what is currently going on.

THE WITNESS: Okay.

DR. DUPRE: So that at such time as, you know, you want to show us the existing chart we may invite you to speak to it.

10 THE WITNESS: Well, I'll tell you, the difference would be that there would be no difference in this area, there would be no difference in this area, there would be no difference in that area. The difference will be here, okay?

DR. DUPRE: Okay. In between primary adjudication and extended disability?

15 THE WITNESS: All of the adjudication functions will be carried out in the primary adjudication section.

In other words, until a decision has been made regarding initial entitlement in a claim, it will not move from this area. So once the adjudication decision is made, that thirteen weeks a claim, like I mentioned before, will no longer hold true. It will automatically flow to the extended disability section, so you will know. All adjudication will be carried out in the one area.

DR. DUPRE: In the accident domain?

THE WITNESS: In the accident domain, that's correct.

DR. DUPRE: But not in the ID and D?

25 THE WITNESS: No. There's no change in those areas.

DR. DUPRE: So there is no change in the ID and D.

THE WITNESS: These two, you move around a little bit.

DR. DUPRE: And that affects accident claims only?

THE WITNESS: That's correct.

30 DR. DUPRE: But we don't really have to worry about that?

THE WITNESS: That's correct.

DR. DUPRE: Dr. Mustard?

DR. MUSTARD: Can I go over this medical side a bit more? Who is the current director of the medical services?

THE WITNESS: Dr. Dowd.

DR. MUSTARD: How do they work in terms of...you may not want to answer this question because it may be more appropriate to be asked of members of that group...but do they sit and formulate policies in terms of medical guidelines, medical affairs as they apply in the compensation process in relation to industrial disease, and if so, do you know how they do it?

THE WITNESS: They do it in consultation with the claims services division. What we would do is, we would create a group of the people involved from both areas to review any existing guidelines, or develop new guidelines as the case may be. And you would sit down in consultation with the medical people and attempt to develop those guidelines.

DR. MUSTARD: Who would initiate that? Would the two senior people, yourself and Dr. McCracken?

THE WITNESS: That would be the normal practice, or the Board itself might indicate that there is a need to develop a guideline and they would...but usually the emphasis for the development of the guideline would come from the operating division.

DR. MUSTARD: And policies re medical review? Your own consulting group, other groups? That would be the two senior people who would bring that together to the Board, if they felt it was necessary? It would originate at that level?

THE WITNESS: Yes. The final decision on the guideline would be made by the Board. They would be referred to the Board for approval, but the presentation to the Board of the documentation would be made by the executive director of medical services and the executive director of the claims services division.

5 DR. UFFEN: Could I...just one more little piece of the jigsaw puzzle that I need, if you could show in another color - say red or green - where does the advisory group on...the advisory committee on...

DR. DUPRE: Occupational chest diseases.

DR. UFFEN: ...occupational chest disease fit in? Who do they advise?

10 THE WITNESS: Basically just here.

DR. MUSTARD: That's into the industrial disease group?

THE WITNESS: The chest group in the medical services division. Any referrals to the advisory committee would be done through the chest services group.

15 DR. UFFEN: I've got written down here, 'industrial disease group' is the expression that was used earlier on.

THE WITNESS: Well, yes. But you've got chest diseases and other industrial diseases. Okay, there is industrial deafness yet.

20 DR. UFFEN: So I go from industrial disease group to another little bracket called chest?

THE WITNESS: Mmm-hmm.

I guess the chart itself would...I don't know whether you show individually on the organization chart or not. I think...

25 DR. UFFEN: I guess what I'm trying to find out is, the ACOCD, does it advise the chest disease group, but not the industrial disease group?

THE WITNESS: Well, you are talking about the claims industrial group or the medical?

DR. UFFEN: It's the medical.

30 THE WITNESS: Okay. The advice would come from the ACOCD to the chest disease group, which is part of the industrial medical group within the same medical services division.

5 DR. UFFEN: That's medical. Now what was this other possibility you just mentioned? You asked did I mean medical or did I mean something else.

THE WITNESS: Well, down here - claims.

The report would come back through the medical people, but would eventually flow to the claims services division, and the ID and D group within claims.

10 DR. DUPRE: Just to make sure I understand, these medical professionals in relation to the various sections of the claims adjudication branch distribute themselves in such a way that you can put a couple of numbers under the ID and D box that would be the medical people who are part of the chest disease group, is that right?

15 THE WITNESS: Yes. These ones here relate down to here. They would seek their advice from either the chest people or the industrial deafness people, or Dr. Burton who does some of the other industrial diseases like chemical poisoning and so on.

20 DR. DUPRE: Okay. And the ACOCD relates to these Board physicians as a consulting physician relates to a physician?

THE WITNESS: I would say yes, sir.

25 DR. DUPRE: And since they relate to the Board physicians in that way, they relate to those Board physicians in their dual capacity up there in the industrial disease group, chest disease, and down there working with the ID and D section?

30 THE WITNESS: Well, the referrals would always be through the medical area. There would be...I can't envision any cases where the ID and D claims people would refer the case on to the advisory committee without going through the medical. It just doesn't happen. All of the referral process is through the medical area.

THE WITNESS: (cont'd.) Can we go back to dealing with the cases, the flow? Okay.

When the case is referred to Dr. Stewart and Dr. Dyer, they make a determination that advice should be sought from the ACOCD. They would refer the file documents on to the committee to arrange for review and examination of the man.

DR. DUPRE: I'm going to stop you there because again I'm extra slow. I want to make sure I understand how it got to Dr. Stewart or Dr. Dyer, who are the chest disease physicians.

As I would understand it, how it got to them is that it is a claim that was routed in to ID and D because it was a disease claim, and I would take it that the adjudicator on being able to form the judgement that it was a chest disease claim and distinct from, say a deafness claim, would then have brought it to the attention of one or the other of the chest disease physicians?

THE WITNESS: That's correct.

DR. DUPRE: Is that correct? Okay.

THE WITNESS: Now, the report would flow back from the advisory committee after they have examined the man. If they determine that there is asbestosis present, they would give an opinion as to the degree of the impairment.

If they determine that there is no asbestosis present, they would make an indication as to whether or not in their opinion further examination is required.

They may suggest that the man be listed for review in one year, two years, what have you. I think that...I don't know whether you have had any testimony from the committee itself, they can be of better guidance to you in this area than I can, as to how they make that determination...but if the recommendation from the committee or the conclusion of the committee is that there is no asbestosis present, that report would be reviewed by Dr.

5 THE WITNESS: (cont'd.) Stewart, Dr. Dyer, and they would put a recommendation on back to the adjudicator that there is no entitlement, that there is no disease. Or they could recommend that a further examination be carried out, in which case the review process would be initiated in the ID and D section.

10 But if the recommendation is to deny on the basis that there is no asbestosis, again the adjudicator is required to refer that claim on to the claims review branch to make that determination. He cannot do that himself. He has to refer it on to the claims review branch and then the process is the same as it was previously.

15 DR. DUPRE: In what sense is it the same as previously?

20 THE WITNESS: Well, the denial or the recommendation for further inquiry would be made by the review branch and they would communicate that decision to the man and to the employer and to his representative if one existed, and indicate that there is no entitlement, the reason there is no entitlement and advise him of his right of appeal.

The only additional input that there would have been would have been the report from the ACOCD.

MR. LASKIN: Q. But...

25 DR. DUPRE: The report from the ACOCD, though, has been obtained, as I understand it, before an ID and D adjudicator denies a claim?

THE WITNESS: In certain instances. Yes. You remember we talked about those twenty-seven cases?

DR. DUPRE: That's right.

30 THE WITNESS: Okay. Those would not have been to the ACOCD. The others would have been.

DR. DUPRE: Those would not have been to the ACOCD?

THE WITNESS: Right.

5 DR. DUPRE: And the remainder would have been to the ACOCD?

THE WITNESS: Correct.

DR. DUPRE: Now, whichever set of claims we are looking at, whether it's the twenty-seven or the rest, any claim that involved a denial would go to claims review?

10 THE WITNESS: That's correct.

DR. DUPRE: Now, to your knowledge has it ever been part of the claims review process to refer an ACOCD report back to the ACOCD?

15 THE WITNESS: I really couldn't say. That possibility exists...if they feel that there is some clarification required. I would think it would be a rarity.

DR. UFFEN: Just to tidy up one little thing. Dr. Dowd doesn't play any role in this flow?

20 THE WITNESS: No, sir. He is the administrator of the branch, that's correct.

There are also some surgical consultants in there, superimposed on the section medical advisors, but they don't have a role, or very little role, in this area.

25 MR. LASKIN: Q. Just to come back to the questions the Chairman was asking, as I understand it, the ACOCD will essentially only become involved if there has been an initial determination or confirmation by Dr. Stewart or Dr. Dyer that there is indeed a diagnosis of asbestosis?

THE WITNESS: A. No, no. It could be that they are seeking the opinion of the ACOCD as to whether or not the actual diagnosis is asbestosis.

30 Q. All right. They have either made an initial diagnosis or they are in doubt?

A. That's correct.

Q. Okay.

5 A. And they would seek the opinion of the committee on the diagnosis, and then on the quantum as well, and that's done at the same time.

10 DR. DUPRE: Just so I can understand the ACOCD in context, could I ask you to name me a few parallel-type bodies? Is there a silicosis...

THE WITNESS: If you want to go back in history, I think it was formed in about 1926, and it was called the silicosis referee board, when silicosis was added to the Act as a scheduled disease.

15 Eventually that gave the connotation that they were a referee board under the provisions of then-section twenty-two, which was not the case. They were advisory. And the board eventually made a determination that the name of the committee should be changed to ACOCD to properly reflect their position - namely that of advisor.

20 DR. DUPRE: So the ACOCD, I can take it, is the one advisory body that any matters involving any kind of disease of the chest will be referred to?

25 THE WITNESS: Well, they could be referred. They are not necessarily referred. You are usually into the asbestosis and the silicosis, the pneumoconioses in cases that are referred there. It's a primary role.

DR. DUPRE: All I'm asking at this point is to understand it in context. Are there other advisory medical committees relating to diseases of other parts of the anatomy?

THE WITNESS: No.

30 DR. MUSTARD: For example, do you have an advisory committee in respect to lead?

THE WITNESS: No.

DR. MUSTARD: Can I, then, suppose that's true...

MR. LASKIN: Go ahead.

5 THE WITNESS: You would have documents, if you will, from the Ministry of Labour regarding lead, sound, that type of thing, but there is no advisory committee per se in any other disease, that I'm aware of.

10 DR. MUSTARD: And is the reason then that this advisory committee exists partly in the original title of the silicosis referee board and indeed the uncertainty aspect of the information required, additional advice, in terms of trying to come to a reasonable decision?

THE WITNESS: That's correct, sir.

15 DR. DUPRE: Now, can I make sure I understand something else.....your reference to section twenty-two, and as I take it, the AC OCD is named as such and situated the way it is precisely so that it will not be confused with...

THE WITNESS: A medical referee.

DR. DUPRE: ...a section twenty-two referee?

THE WITNESS: That's correct.

20 DR. DUPRE: Is that correct?

THE WITNESS: That's correct.

DR. DUPRE: Well, now, may I ask you, do section twenty-two medical referees come into...

THE WITNESS: They are very rarely used.

25 DR. DUPRE: ...the picture we are looking at?

THE WITNESS: Very rarely used.

DR. DUPRE: To your knowledge have they ever been used in asbestos-related claims?

THE WITNESS: I honestly could not say, sir.

30 DR. DUPRE: Could you give me a for instance, maybe, from your experience, of what they are used for?

THE WITNESS: Usually where you have a conflict

THE WITNESS: (cont'd.) of senior medical opinion,
the board will offer a medical referee...usually it's from a panel
of two or three doctors, the individual would select.

One of Weiler's recommendations is the creation
of a more formal medical referee.

DR. DUPRE: Well, just going to his White Paper
for the moment, and the draft Act, so that I can try to understand
that in context, can I take it that his MRT's would basically
replace the medical referees envisaged by section twenty-two?

THE WITNESS: Yes, sir. I would think that's a
reasonable conclusion.

DR. DUPRE: Okay. But the fact of the matter would
be, at least to the extent that you from your experience would
know, that section twenty-two referees have rarely, if ever,
been invoked in industrial disease cases, or perhaps more
narrowly - asbestos-related disease cases?

THE WITNESS: I would think that's a fair
statement. I am familiar with one case when I was assistant
secretary of the Board, where there was an industrial disease
case...it was not asbestosis...where a medical referee was
invoked. But it doesn't happen all that often.

DR. DUPRE: I just find that intriguing.

Is this perhaps an appropriate moment to break for
ten minutes or so?

MR. LASKIN: Sure. I think so.

THE INQUIRY RECESSED

THE INQUIRY RESUMED

MR. LASKIN: If the commissioners are digesting
that chart, I was going to have Mr. McDonald put up the
corresponding chart on the appeal side.

5 DR. DUPRE: That would just be grand, counsel.
I have one last question arising from what we were discussing
before the break, and it's simply this: Is there, Mr. McDonald,
any particular clause of the statute to which the ACOCD can
be linked?

THE WITNESS: Seventy-one, three G, I would
suggest.

10 DR. DUPRE: Seventy-one, three G. That's in
the revised statute?

THE WITNESS: Yes. Mm-hmm.

DR. DUPRE: Seventy-one, three G, which is...I
see: "Establish, maintain and regulate"...

THE WITNESS: "Establish, maintain and..."

15 DR. DUPRE: "...advisory councils or committees,
their functions and composition".

THE WITNESS: Yes, sir.

DR. DUPRE: Thank you.

20 MR. LASKIN: Q. Could you assist us, Mr. McDonald,
by putting up the same organization flow chart on the appeal
side?

(REPORTER'S NOTE: At this time the witness
complied with the above request.)

25 THE WITNESS: Once the decision has been made by
the claims review branch to deny entitlement or deny an
employer's rejection, they offer the right of appeal, and within
that advice to the employer is an indication as to how they can
go about appealing that decision - that is, by submitting the
appeal to the registrar of appeals.

30 The case would then be reviewed by an appeals
adjudicator, a decision would be made as to whether a hearing
should be offered or whether the appeals adjudicator could, on the

THE WITNESS: (cont'd.) basis of the documentation, make a decision.

5 It would be more often than not that a formal hearing would be offered to the individual. He would then be advised of the date of the hearing or offered the right of appeal and has to select the date of the hearing, and then the appeals adjudicator would sit and hear the presentation of the man, his representative or the employer, and all of the parties to the appeal are notified of the date and place of the appeal.

10 The appeals can be held in Toronto at the Board's offices, or throughout the province at various centers where you have a major population - Windsor, London, Sudbury, Thunder Bay, Ottawa are the primary areas where they would sit.

15 The appeals adjudicator again...

MR. LASKIN: Q. Is he specifically provided for in the statute, by the way?

THE WITNESS: A. No.

20 Q. He is part of section seventy-nine, "The Board shall determine its own practice and procedure in relation to appeals"?

A. Yes, that's correct.

25 The appeals adjudicator would hear the evidence presented, could make a decision on the basis of that evidence, or could request additional information subsequent to the hearing, and then he would render that decision and he would be fairly lengthy, giving all of the summary of the testimony provided and the reasons for the decision.

30 Q. As I understand it, if I am an appellant, do I have an absolute right to a hearing, or is that a matter within the discretion of the adjudicator as to whether to grant me a hearing?

5 A. No, you would have a right to a hearing. You could insist upon a hearing before an appeals adjudicator.

There are occasions when the appeals adjudicator level, the appeals adjudicator on review of the documents would indicate that there is really no purpose in him having a hearing. He would refer the man on, the case on, for an appeals board.

10 But again, if the appellant insists upon it, you will have an appeals adjudicator hearing as well. It will go back before the appeals adjudicator hearing.

Q. Just to follow up one question, one comment that you made, that the appeals adjudicator after having heard the parties could make an assessment that he or she requires further evidence.

15 Having obtained that further evidence, is that further evidence then made available to the parties to make submissions on it?

A. It is made available to the parties, yes.

Q. Do they reconvene? Do you reconvene the hearing?

20 A. Rarely.

Q. Sorry?

25 A. Rarely. They would receive written submissions in some instances. It doesn't always go to the appellant. It would depend on the individual case and what was agreed upon at the time the adjudicator had the hearing as to where he was going to go with the case.

Q. He wouldn't necessarily send that information to the appellant?

A. No, sir.

30 Q. Could that information be, in respect of asbestos claims, an additional report from the ACOD?

A. It could be, but again I think you are into an

5 A. (cont'd.) issue that there aren't very many cases go there. You have some of the fatalities, but very few of the asbestosis cases go there unless it's an issue of quantum, and it could go back to the ACOCD for additional input.

10 Again, the adjudicator would render his decision to the parties and the right of appeal would be included along with that decision. If, following the appeals adjudicator decision there is a further appeal, it then would be referred to the commissioners of appeal and the commissioners themselves.

Q. Before we get there, what is the relationship among the three boxes on the left side?

15 A. Okay. There is a manager of the appeals adjudicators, who has the administrative responsibility - he is a former appeals adjudicator, he is the one required to schedule all of the hearings for the appeals adjudicators and assign the adjudicators to the cases.

Q. He has no decision making power?

20 A. No. He does not sit as an appeals adjudicator. There is no reason he could not sit as an appeals adjudicator if so required, if the case load was such that his presence was required as an appeals adjudicator, then he could certainly sit. But on a general day-to-day basis, he does not have any decision making.

25 Q. I should have asked you, incidentally, the same question about yourself. Do you have any decision making power as head of that claims adjudication structure?

A. I do, but I very rarely am involved with claims. It is primarily the administration of the division that is my responsibility.

30 Q. You yourself could exercise such powers if you saw fit, or if the work load was such?

A. Yes. But it doesn't occur.

Q. It doesn't occur?

A. No.

Q. Okay. And the registrar?

A. The registrar of appeals, again, has no decision making power. He is the administrative body, if you will, who has charge of the appeals adjudication function solely. All appeals to a review branch decision, or one of the other operating divisions - we have been talking about claims, but you can also appeal a decision that has been made regarding an employer's assessment or a rehabilitation decision. These would flow through the registrar of appeals, but again they are in the minority - commutation of pension or something like that.

It would be referred to the registrar of appeals. He has the overall administration of the appeals area. The scheduling of hearings for the appeals adjudicators falls here, the scheduling of appeals for commissioners of appeals and the commissioners themselves are arranged through the registrar of appeals.

Q. Before we get to commissioners, there is another person that gets referred to in some of the materials, and that's a worker's advisor. Where does that office come in?

A. In the notification of appeal, the worker is advised that if he does not have a representative, the services of a worker's advisor will be made to him free of charge, and the worker's advisor would assist him in the presentation of his appeal either at the appeals adjudicator level or at the appeal board level.

There are three. They currently work out of Toronto, but they travel throughout the province as well, to represent workers on their appeals.

Q. Do they report to anybody, or are they a self-contained unit?

5 A. They report to the vice-chairman of administration. They have no operational responsibility as far as the appeal system itself is concerned. They are not on that chart.

Q. They are on another chart?

A. They are another chart.

Q. Perhaps we can get to that chart in a moment.

10 A. Okay.

Q. All right.

A. The appeals adjudicator is a one-man hearing, and he renders that decision.

The commissioners of appeals and commissioners sit as a body of three.

15 DR. DUPRE: Just before we get to the commissioners of appeal, Professor Weiler in his Reshaping Workmen's Compensation Report, characterized appeals adjudicators as experienced staff employees of the Board who have risen through the ranks.

20 Does this make it likely that most appeals adjudicators would have worked in the claims review branch before becoming appeals adjudicators?

THE WITNESS: I'm just trying to think of the composition of them. I don't think there are any in that area who were not members of the claims review branch, or senior claims review branch people, at one point in time.

25 DR. DUPRE: You can't think of any who were not?

THE WITNESS: No, that's right. They all came through the claims review branch. Most of them were in supervisory positions as well.

30 No, I don't believe there are any, and I would think that the majority of them are twenty to twenty-five year, if not in excess of twenty-five year, employees.

5 MR. LASKIN: Q. How long has that position been in effect? Does the appeals adjudicator go back a long way, or is this a recent phenomenon?

THE WITNESS: A. No, I can't give you the exact date. I would have to...I'm trying to think of my own history.

Q. Have they been around as long as you have?

10 A. No. No, there was an appeals tribunal at one time, where you had a three-person hearing before the three-person board hearing, and even then it was not necessarily three. It could be two at both levels. But then they made the decision to create the appeals adjudicator.

15 I would have to suggest that it's over ten years... ten to twelve years, I would think. I can check if you feel that that is significant.

20 But when a decision was made to go with the single adjudicator, the decision was also made at the Board that the appeal board hearings would always be three-member hearings.

Q. Three?

25 A. Right. So they did away, in effect, with the two-man hearings. But there was a reason for two-man hearings. They only had a three-man board at that point in time. They created additional board members and commissioners, which gave them greater flexibility in terms of being able to sit, and the number of cases that they heard also increased.

30 The board also, the appeal board, would sit in Toronto, or travel throughout the province. And again, they would render a decision, and their reasons within that decision for the denial...or the allowance, at least, depending on what the decision was.

Q. All right. Are you now taking us to the final...?

A. The commissioner of appeals...okay, you have

5 A. (cont'd.) the members of the corporate board, of whom there are six at the present time; you have the chairman, the vice-chairman of administration, the vice-chairman of appeals and three commissioners of appeal. They make up the corporate board.

10 The corporate board does not normally sit on any adjudication decisions. They have that power, but they do not normally sit on any adjudication decision. That is the commissioners of appeals report through the vice-chairman of appeals, and there are three-member boards. It could be made up of three commissioners of appeals, or just three commissioners, depending... the content of the appeal board would vary depending upon who was available for the hearings and where they would be sitting.

15 Again, they would hear the case...I'm sorry, John?

Q. No, it's just I think I now am behind you, Mr. McDonald.

The corporate board...the board?

20 A. The board.

Q. That operates the WCB?

A. Right.

Q. Is how many people?

A. Six.

Q. Six?

25 A. Yes. The chairman, two vice-chairmen, the vice-chairman of administration and the vice-chairman of appeals. The vice-chairman of administration has no decision-making function. He is the general manager of the organization.

Q. And three other commissioners?

A. Commissioners of appeals.

30 Q. And that's the corporate board?

A. That's the corporate board.

5 Q. I take it...there is a typographical error in Professor Weiler's report at page one zero nine when he says there were sixteen commissioners. That should have read six.

A. No.

Q. No? Oh, I'm sorry.

10 A. I'm talking about the corporate board now. In addition to the corporate board, there are also commissioners whose sole function is to sit as appeal board members to hear individual cases. The number is not sixteen anymore. There have been a couple...one of the commissioners of appeals retired.

Q. So the vice-chairman of appeals at the very top there is...

A. A member of the corporate board.

15 Q. ...a member of the corporate board under section fifty-seven of the Act?

A. Yes.

Q. The commissioners of appeal...?

A. Are also members of the corporate board.

Q. The corporate board. Three of them?

20 A. Yes. The commissioners are not members of the corporate board. I guess you could really put them in a separate box there.

25 I guess, a personal opinion, to be more reflective of the duties, you might like to reverse those titles, because it gives the impression that the commissioners of appeals sit only on appeals and the commissioners are part of the corporate board, and it can be confusing.

But when they were created, the position already existed so they added commissioners as such.

30 Q. Are those commissioners, as such, specifically referred to in the Statute?

A. Under section sixty-three, four, "The other

5 A. (cont'd.) "commissioners shall assist the vice-chairman of appeals in the performance of his duties."

Q. Mmm-hmm.

DR. DUPRE: What section is that again?

THE WITNESS: Sixty-three, four.

10 MR. LASKIN: Q. Oh, I see. But we really have to go back to section fifty-eight, I take it?

THE WITNESS: A. Yes.

Q. "What commissioner means, amongst other things..."

A. "And such commissioners as the Lieutenant-Governor in council"...

15 So they are in addition to commissioners of appeal. Section fifty-eight, and then you get into sixty-three, four, and their function is solely in the appeals area.

Q. Can you have an appeal where three commissioners will hear the appeal, or must there always be either the vice-chairman of appeals or a commissioner of appeals?

20 A. No. Three commissioners can hear the case. It is not necessary to have one of the corporate board members as a part of that hearing.

Q. Is the purpose of their appointment because of the work load?

25 A. Yes. Because of the increased travel, the board at one point in time, when it was a three-man board, solely held hearings in Toronto. Then when they made the decision to travel, you required greater flexibility and increased numbers, so they increased the number of commissioners and they now travel. I would suggest that there is very rarely a week when there aren't commissioners outside of the office on hearings, in another city

30 in the province.

Q. Does the vice-chairman of appeals, to use a

5 Q. (cont'd.) legal analogy, perform the same kind of role vis a vis his commissioners as a chief justice of a particular court might?

A. I'm not familiar with that role, but the vice-chairman of appeals doesn't sit on very many cases. He has the overall administrative responsibility for the operation of the appeals area. He does sit on some cases, but not many.

10 Q. Not very many?

A. Yes. He was a former commissioner of appeals and moved up to the vice-chairman of appeals at the retirement of the last vice-chairman.

15 DR. DUPRE: Do the commissioners of appeals, capital C, capital A, who are also corporate board members, roughly how much of their time do they devote from appeals as distinct from, of course, their corporate board duties?

20 THE WITNESS: The majority of their time is devoted to the appeals area. The corporate board per se meets on a regular basis once a month, and otherwise as required depending on the work load that they have.

But the majority of their time is most definitely spent on appeals.

DR. DUPRE: And now your straight commissioners would spend a hundred percent of their time?

25 THE WITNESS: All their time. They have no corporate responsibilities whatsoever - all on appeals.

MR. LASKIN: Q. Are they full- or part-time appointments?

THE WITNESS: A. Full-time appointments. They are there every day.

DR. DUPRE: Are they order-in-council appointments?

30 THE WITNESS: Yes, they are. Order-in-council appointments. The board does not appoint any commissioners,

THE WITNESS: (cont'd.) commissioners of appeals,
vice-chairmen or the chairman. They are all order-in-council,
and the term is set out within the Act.

DR. DUPRE: Where is that found, by the way?

MR. LASKIN: Section fifty-eight.

THE WITNESS: Section sixty-one.

MR. LASKIN: Q. Oh, the term?

THE WITNESS: A. Yes.

Q. Five years?

A. Not more than five years.

DR. DUPRE: Oh, I see. And section sixty-one
applies to all commissioners?

THE WITNESS: That's correct.

DR. DUPRE: All commissioners of appeal and
commissioners?

THE WITNESS: Yes.

DR. DUPRE: That term, though, in section sixty-one,
the commissioners, does not include the chairman or the
vice-chairman?

THE WITNESS: Yes, sir. It does.

DR. DUPRE: Oh, it does?

THE WITNESS: Yes, sir. They are commissioners
per se.

DR. DUPRE: Okay.

MR. LASKIN: I think, Mr. Chairman, if you go back
to section fifty-eight, the term commissioners is...

THE WITNESS: Defined.

MR. LASKIN: ...defined.

DR. DUPRE: I see it. Thank you.

THE WITNESS: Again, they would hold a hearing
as an appeals adjudicator, and render a decision following that
hearing.

5 MR. LASKIN: Q. Could we trouble you one last time, Mr. McDonald, to put up the administrative framework of the Board, the organization chart that pertains to the administrative framework from...

THE WITNESS: A. The top?

Q. From the top?

10 (REPORTER'S NOTE: At this time the witness complied with the above request.)

THE WITNESS: I think that's got most of it.

Okay. You have the corporate board, which is made up of the...oh, cripes, I left off the...in effect, that makes up the corporate board.

15 The secretary of the board has the administrative function only. He has no direct-line management. The worker's advisors report to the vice-chairman of administration, the general manager.

20 You have an assistant general manager and senior executive director who reports to the vice-chairman of administration and general manager.

Reporting to the assistant general manager are the executive director of claims, myself, the executive of vocational rehabilitation, the executive director of communications and the executive co-ordinator of regional operations, and area offices.

25 DR. DUPRE: I just can't read...what's the handwriting in that box...?

THE WITNESS: Assistant general manager and senior executive director. My printing leaves something to be desired.

DR. DUPRE: Assistant general manager.

THE WITNESS: Yes. And senior executive director.

30 DR. DUPRE: And senior executive...well, that's the title of one person?

THE WITNESS: Yes. That's correct.

DR. DUPRE: Okay.

MR. LASKIN: Q. Who is that person?

THE WITNESS: A. Bill Kerr.

Then you have three executive directors reporting to him - the executive director of claims...

Q. That's you.

A. ...vocation and rehabilitation, and communications. They report through him to the vice-chairman of administration/general manager.

DR. DUPRE: What's the REG OP, or whatever that is?

THE WITNESS: Oh, regional operations.

DR. DUPRE: Oh, regional operations? Okay.

THE WITNESS: We have an office in London, and an office in Sudbury, where adjudication is done. The other area offices do not do adjudication. All the balance of the adjudication is done in Toronto.

DR. DUPRE: Now, the regional operations are on the same level as the claims, the vocation and rehab, and communications?

THE WITNESS: It is one level below.

DR. DUPRE: That is, not below...it doesn't report...

THE WITNESS: It doesn't report to an executive director. It reports to the senior executive director.

DR. DUPRE: I see.

THE WITNESS: It's on the same level as the program planning secretariat, the actuary and the solicitor, that I've got going into the vice-chairman of administration and general manager.

The executive director of medical, the executive director of finance, the executive director of administrative services - he has responsibility for the plant operation, the computer system - the safety education and the human resources personnel function.

MR. LASKIN: Q. The vice-chairman of administration and the general manager is...?

THE WITNESS: A. Al MacDonald.

Q. Al MacDonald?

A. Correct.

Q. And the executive director of vocational and rehab?

A. Art Darnbrough, D A R N B R O U G H.

Q. And the executive director, medical?

A. Dr. McCracken.

Q. Dr. McCracken?

A. That's correct.

PPS is policy planning secretary.

DR. MUSTARD: Sorry. Does the PPF report to the...

THE WITNESS: To the vice-chairman of administration.

DR. MUSTARD: So the only group coming to the assistant general manager are the people on the left?

THE WITNESS: That's correct - claims, rehab, communications and regional operations.

DR. DUPRE: And that box 'medical', is the medical services division box that you fleshed out for us before?

THE WITNESS: That's correct.

I'll make copies of the actual charts available to the Commission.

DR. MUSTARD: One other question, the line goes up to the MOL. That's to the Minister of Labour?

THE WITNESS: The Minister of Labour, that's right.

DR. MUSTARD: Not the ministry?

THE WITNESS: No, minister.

DR. MUSTARD: Accountable to the Legislature through the Minister of Labour?

THE WITNESS: That's correct.

MR. LASKIN: Q. The special rehabilitation assistance programs and the like are out of vocation and rehab?

THE WITNESS: A. Vocation and rehab. That's right.

Q. Is there any particular organization that flows under that?

A. Yes. There is an organizational chart for the vocation and rehabilitation division as well. I don't think that I would like to present that one for you. They are also in... okay, I can get it for you and I would prefer to do it in that manner rather than put the chart on the board for you.

It's the same basic structure. You have the executive director and then you have two directors within that branch. You have a divisional co-ordinator who works with the executive director, and then you have the managers of the various areas, the various functions that they carry on within that. The chart is more descriptive.

Q. And the position of secretary, of course, is the position that you formerly held and is now held by Mr. Joma?

A. Mr. Joma, that's correct.

MR. LASKIN: Perhaps since we only have a few minutes left, are the commissioners content with that chart, or did you...

DR. DUPRE: Dr. Mustard? Dr. Uffen? Are we finished with that chart?

DR. UFFEN: I suspect we will want to come back to it, so don't rub it out.

THE WITNESS: What I'll attempt to do, sir, during the noon recess, I can get you the actual charts, which are maybe a little easier to follow than what you have here, if that would be of assistance. I would be glad to get them.

DR. UFFEN: Mr. Laskin, is it your intention to

5 DR. UFFEN: (cont'd.) initiate some questions about the relationship between the appeal structure and the advisory medical group?

MR. LASKIN: I was going to ask Mr. McDonald a few questions about that, but by all means go ahead.

10 DR. DUPRE: I'm teeming with questions that you probably already thought of, counsel, on the appeals thing, but if that's a chapter you wish to hold off until after lunch, that's fine.

MR. LASKIN: Well, can I do this before lunch - one thing I wanted to have Mr. McDonald identify, and because it's a document and we'll all have a chance to look at it over the lunch hour, is the Board's present policy on access to documents.

15 I think, Mr. McDonald, you have been good enough to provide me with several copies of the Board's current policy statement on access to files.

THE WITNESS: A. Yes, sir.

20 MR. LASKIN: What I think I will do is get you to identify this as being the policy statement, and then I can circulate and we can all have a chance to look at it over lunch.

THE WITNESS: Yes.

MR. LASKIN: Q. Is that in fact the statement?

25 THE WITNESS: A. The document is headed, Policy Statement - Access to Workers' Claim Files. It's a general statement, the guidelines covering the access, and it was dated December 28, 1981.

Q. And has been in effect since then?

A. That's correct, sir.

30 Q. Can I just ask you generally, and we may have some more specific questions on it after lunch, but does it generally implement the recommendations made by Professor Weiler in his...?

5 A. Yes, sir. Once there is a disputable issue, the man is provided with a copy of his claim file...all of the documents within that claim file...or his representative.

MR. LASKIN: Perhaps we can give that an exhibit number.

10 THE WITNESS: There is some additional documentation in that folder that you have produced. I wasn't sure if you wanted to identify that as well.

MR. LASKIN: We may get to that.

MR. LASKIN: Q. Just coming back to the appeal structure for the moment, the three-person appeal board, which is I take it, the final appeal board, the final appeal route within the Board itself?

15 THE WITNESS: A. That's correct.

Q. Comes on appeal from an appeals adjudicator normally?

A. Normally, yes. But you can go past the appeals adjudicator in certain instances.

20 Q. All right. You can go directly from the claims review branch directly to..

A. To an appeal board hearing.

Q. To the appeal board?

A. That's right.

25 Q. Those kinds of cases would be what? Difficult cases where it is anticipated it will get there...

A. In some instances, yes. But again, as I suggested, if the appellant or his representative is insistent, then an appeals adjudicator hearing would be offered.

Q. And...?

30 A. The practice would be that they would advise the man that an appeal board hearing has been scheduled and he could make the decision as to whether he wished to invoke the appeals

A. (cont'd.) adjudicator level.

5 DR. DUPRE: Can I just ask you about that in terms of how it squares with Professor Weiler's description? I'm looking at page one zero nine.

THE WITNESS: I'm sorry, sir. I don't have a copy of Professor Weiler's report with me.

10 DR. DUPRE: I can read it, actually. It's quite brief.

If you look at page one zero nine, you see the paragraph, second paragraph, which begins with the words, "This still leaves"?

THE WITNESS: Yes, sir.

15 DR. DUPRE: If you go down that paragraph, they encountered a two-stage system of appeal.

20 "The first stage consists of review by appeals adjudicators - experienced staff employees of the Board who have risen through the ranks. Appeals adjudicators disposed of thirty-six hundred appeals last year. Their initial review of the file may result in its being sent on to an appeals court."

THE WITNESS: Yes, sir.

25 DR. DUPRE: Do I take it from that, then, that an appeals case will invariably go to an appeals adjudicator for initial review?

THE WITNESS: Yes, sir.

DR. DUPRE: The appeals adjudicator may then hear an appeal himself, or he may instead direct the appeal straight to the appeal court?

THE WITNESS: That's correct, sir.

30 DR. DUPRE: And it is entirely within the discretion of the appeals adjudicator himself whether to hear the appeal or

5 DR. DUPRE: (cont'd.) do away with that stage and ship it straight to the appeals board?

THE WITNESS: Yes, sir.

DR. DUPRE: I see.

MR. LASKIN: Q. And...

Did you want to pursue that?

10 DR. DUPRE: I guess the question that comes to mind immediately is, do appeals adjudicators - are they given any criteria on the basis on which to base...?

15 THE WITNESS: Usually it would be a case which is... well, obviously a decision which is, if you will, contrary to the stated policy of the Board, or an issue which does not meet the criteria of the Act itself, where the appeals adjudicator would have no option but to confirm the initial decision of the claims review branch.

20 I guess an example would possibly be where the individual had not requested personal coverage under the provisions of the Act prior to the time of the accident. The evidence is there that no such request was made, there is no point in the adjudicator...there is no additional evidence to present. It's merely a review of the evidence, and he would have no purpose in hearing that case. He would refer it on to the appeal board itself to hear the case, because there is no new evidence to be presented regarding the fact situation of the case.

25 DR. DUPRE: This is an appeal from an employer, that you are describing here?

30 THE WITNESS: Yes. An employer who has failed to request personal coverage and his claim has been denied on the basis that he has not requested personal coverage and he would not have entitlement.

That's an example.

MR. LASKIN: Q. Why wouldn't he make that decision himself on the basis of the evidence before him?

5 THE WITNESS: A. Well, the man still has the right to go before the appeal board. Like, he can make that written decision and present it to the man, but the man still has the right to carry that appeal to the appeal board. You cannot eliminate that final step, so all he is doing is saying there is no purpose in my rendering this decision - I cannot change the
10 decision based on the facts. I will refer it on to the appeal board to hear the case.

I would suggest to you that the carrying of the case before the appeal board I don't think would result in the change in the decision either, but that's the type of thing and they would have to hear it even though...

15 Q. You are saying the appeals adjudicator wouldn't change the decision because he would otherwise be going contrary to Board policy?

A. I'm saying he is going contrary to the Act. The man has not requested personal coverage prior to the accident.

20 DR. DUPRE: Dr. Uffen?

DR. UFFEN: The appeals adjudicators who are handling, I guess many cases, what is their career path? Do they ever move out of appeals back over into some more senior position in the rest of the structure?

25 THE WITNESS: I guess, as I suggested, the appeals adjudicator role has been there for approximately ten years. The majority of the people who have left the position of appeals adjudicator have retired, because they were up in the twenty-five, thirty year range when they entered into it, and they completed their service in that area and retired.

30 DR. UFFEN: Any that haven't? Any notable exceptions that have gone up through the structure in some other route?

5 THE WITNESS: I can't think of any offhand that have been appeals adjudicators and have come back into the management stream.

DR. UFFEN: And the only way they could become a commissioner is if the government, by order-in-council, made them a commissioner?

THE WITNESS: That's correct.

10 MR. LASKIN: I'm just thinking of Mr. Edwards' time problem, Mr. Chairman.

DR. DUPRE: I think it is now appropriate for us to rise until two o'clock.

MR. EDWARDS: Thank you, Mr. Chairman.

15 THE INQUIRY RECESSED

- - - - -

THE INQUIRY RESUMED

DR. DUPRE: May we resume, please?

20 Dr. Uffen has a question that he wishes to pose, that relates to a matter that was under discussion when we rose.

Dr. Uffen?

DR. UFFEN: We were talking about the organizational structure for appeals...still on the board...and I have been interested in the career path for appeals adjudicators, of which I remember there were several. I have forgotten how many.

25 THE WITNESS: Thirteen.

DR. UFFEN: Is my recollection correct that they were drawn from other parts of the organization and were, generally speaking, men with considerable experience?

THE WITNESS: That's correct, sir.

30 DR. UFFEN: Maybe twenty-odd years, or something like that?

THE WITNESS: Yes, sir.

DR. UFFEN: I'm curious about their future career.

5 What opportunities are open for promotion or career development for an appeals adjudicator?

10 THE WITNESS: I guess I can relate best that all of the positions within the Board, up to the executive director level, are all part of a posting process where when the job becomes vacant, that job is posted internally and if the need is seen, externally advertised as well, so that anyone who has an interest in any of the positions that are available would apply for those positions.

15 The level above the appeals adjudicator would be the manager of the appeals adjudicators, the directors of the various branches and the registrar of appeals.

20 I guess the most recent vacancy - there were two directors, the director of the claims adjudication branch and the director of the claims review branch - those individuals had the opportunity to apply for either of those positions as they became vacant.

25 DR. UFFEN: So there are about four or five...the manager of appeals adjudication, which would be straight up the appeals...

THE WITNESS: Yes.

25 DR. UFFEN: ...is the registrar of appeals regarded as a promotion from manager?

THE WITNESS: Yes, sir. Yes.

DR. UFFEN: Then the other one would be director?

THE WITNESS: Directors of the various branches.

30 DR. UFFEN: It's a little hard for me to grasp so quickly, but would those be normally regarded as promotions to go, say, from registrar of appeals to a director? Would that be a promotion or sideways?

THE WITNESS: No. The registrar of appeals is above the level of directors.

5 DR. UFFEN: Above the level of directors?

THE WITNESS: Yes.

DR. UFFEN: Roughly how many appeals adjudicators are there?

THE WITNESS: Thirteen, sir.

10 DR. UFFEN: Thirteen. So there are career opportunities, along with a lot of other applicants, for about four of them. What happens to the ones that don't...

15 THE WITNESS: Well, the career opportunity is there for all of them, should they choose to follow that. Like, the current executive director of the vocation and rehabilitation division, for example, came out of the claims adjudication branch, and the current co-ordinator of the regional operations area also came out of claims adjudication. But the opportunity is there for anyone to apply for these positions.

20 DR. UFFEN: Let me put it this way. If an appeals adjudicator doesn't make application for a vacancy that occurs someplace, can he be required to?

THE WITNESS: He can be a management nominee. Yes, sir.

DR. UFFEN: He can be a nominee?

THE WITNESS: Yes.

25 DR. UFFEN: But he could elect to finish out his career and retire?

THE WITNESS: Yes, sir. That's correct.

DR. UFFEN: So there's three parts - retire...

THE WITNESS: Nominee.

DR. UFFEN: ...management nominee, or...

30 THE WITNESS: Or apply.

DR. UFFEN: ...apply.

THE WITNESS: That's correct.

5 DR. UFFEN: Who decides on senior promotions and appointments?

THE WITNESS: For the position of director, the interviews would be carried out by the executive director involved.

10 Like, for any of the directors positions within the claims adjudication branch, of which there are three - the director of the review branch, the director of the claims adjudication branch and the director of the claims administrative service branch - the conduct of the interviews would be done by the executive director.

DR. UFFEN: Who decides?

15 THE WITNESS: The executive director would normally have that decision and would make that recommendation to...

DR. UFFEN: To whom?

20 THE WITNESS: Generally to the senior executive director or the vice-chairman of administration, depending upon which area you are, but it would be very rare that those individuals would overrule the executive director. It's his operating branch that...

DR. UFFEN: You don't have the equivalent of a promotion committee, where a group of people sit in judgement of the various applicants?

THE WITNESS: No, sir.

25 DR. UFFEN: It's a line promotion, up the ladder?

THE WITNESS: That's correct, sir.

DR. UFFEN: That answers my questions.

30 THE WITNESS: In the...if you will, coming in from the team co-ordinator to the supervisor role within the adjudication branch, the director of the branch, in consultation with the managers, would review all of the applicants and they would make it a joint decision. But when you get to the director level, it is

THE WITNESS: (cont'd.) usually on the basis of the interviews carried out by the executive director.

5 He would certainly consult with the...

DR. UFFEN: Doesn't the Board itself have any role in the senior...in approving the senior appointments?

THE WITNESS: To the executive director level, yes, sir. But I was talking about the director above...

10 DR. UFFEN: I'm sorry.

THE WITNESS: Executive director and above.

Like, my appointment as executive director of the claims services division was approved by the Board.

DR. UFFEN: But below executive director it can be a one-person appointment?

15 THE WITNESS: I would consult with my superior before making that final decision, sir, but it is basically my decision.

DR. UFFEN: Does the same thing apply to salary increases? You know, promotion may only come once every five years or so, but annual salary increments, how do...

20 THE WITNESS: You have an incremental system that you would obtain that next salary level on your anniversary date, sir.

DR. UFFEN: That's an annual increment, but are there any merit increases?

25 THE WITNESS: You would go to the maximum of the job position, but to go beyond that you would have to have a recommendation from the supervisor or the individual supervisor to the vice-chairman of administration, before you would go into the...

30 DR. UFFEN: There are internal barriers within the ring?

THE WITNESS: That's correct.

DR. UFFEN: And who decides on whether he gets it?
One individual?

THE WITNESS: Ultimately, the vice-chairman of
administration would have the final decision, but the recommendation
would come from the executive director, or in the case of one
below him the director would recommend.

DR. UFFEN: Just one man?

THE WITNESS: Yes, sir.

DR. UFFEN: Okay.

MR. LASKIN: Thank you, Dr. Uffen.

DR. DUPRE: I just want to make sure I have a sense
of one thing. If the director level is basically the level that
is immediately above the level of an adjudicator...

THE WITNESS: No, sir. No, no. No, sir.

If you look at the organizational chart for the
claims adjudication branch, which is the third page of the
documentation you have there...

DR. DUPRE: Right.

THE WITNESS: If you look, for example, under
the continuing disability section...now, I suggested to you
earlier that we were in the process of reorganizing and the names
would be changing. Within that section you have claims
adjudicators reporting to team co-ordinators, then to the
supervisor, then to the manager of the continuing disability
section, then to the director.

But for all of these positions...

DR. DUPRE: I had mixed them up with the appeals
adjudicators. So I'll just start all over again.

THE WITNESS: Oh, okay.

DR. DUPRE: I take it that the next level up from
an appeals adjudicator is at the level of director?

THE WITNESS: No, it will be the manager of the

5 THE WITNESS: (cont'd.) appeals adjudicators, or a lateral move to a manager in one of the operating divisions at the same level.

DR. DUPRE: Oh, okay. So at this point there are a number, there will be a fairly substantial number of positions...

THE WITNESS: Oh, yes, sir.

10 DR. DUPRE: ...that are senior to that of appeals adjudicator - not just at the director level, but at the manager level as well?

DR. UFFEN: And whether they get it or not is a one-man decision.

DR. DUPRE: Okay. I was just trying to establish the number of higher positions, but it's fairly substantial.

15 THE WITNESS: When you suggest that they are a one-man decision, Dr. Uffen, I think that the director would consult with the executive director involved in making that recommendation, and I guess because of the length of service, the majority of the people who are in the director/executive director level, you would have a fair knowledge of that individual's capabilities that he has shown in various areas over a period of time.

20 They have, if you will, a promotional matrix that they look at as to whether the individual meets the service requirements, the educational requirements, where his experience has been within the organization, in making that recommendation.

25 DR. UFFEN: Is it common to all...everybody uses the same matrix?

THE WITNESS: There is a different matrix for the different positions.

DR. UFFEN: But a similar structure?

THE WITNESS: Yes, sir.

30 DR. UFFEN: I guess what's bothering me, and we see all kinds of different organizational structures...I have

5 DR. UFFEN: (cont'd.) come up through a so-called collegial system where things rarely happen that way, where the boss decides...but is it not possible that if somebody doesn't behave too well in the eyes of his immediate superiors, his chances of salary, merit increases and promotion are very drastically affected by the opinion of that one individual senior to him?

10 THE WITNESS: You have within the area...let's take for example the claims supervisor. He is working for a manager.

15 Now, he meets on a regular basis with that manager, also with the director and with the other managers of the area, the two managers of the area. When he is applying for a more senior position, i.e. a manager's job within the adjudication branch, the director would be consulting with the three managers to get their opinion as to the relative merits of the candidate.

The ultimate decision is a one-person decision, but he certainly consults with others before the decision is made.

20 DR. UFFEN: Is it obligatory that he consults? Or is that a voluntary?

25 THE WITNESS: I wouldn't say it's obligatory, but I would say it is done in all instances.

Like, at the present time we are in the process of reviewing the applicants for the position of supervisor, and those interviews...

25 DR. UFFEN: Supervisor, again?

THE WITNESS: Claims adjudication branch.

DR. UFFEN: Okay.

30 THE WITNESS: Those interviews are being carried out by the manager, and then the manager in consultation with the other two managers and the directors, having regard for the matrix, will make recommendations for the supervisory position, and they are generally coming from either the team co-ordinator level or some other area within the Board where they have that experience.

5 DR. UFFEN: It's not uncommon in some big, complicated organizations to have a committee that can poke in every once in a while and see whether somebody has been overlooked - I'll use the polite expression - by virtue of the system...sort of an external audit which leaks down a tier to avoid lack of partiality.

Do you have any such governor on your system?

10 THE WITNESS: Only in the immediate supervisor of the person who is making the recommendation.

DR. UFFEN: Okay. I understand the system.

DR. DUPRE: Counsel?

MR. LASKIN: Mr. McDonald, thank you for bringing these charts to us over the lunch hour.

15 THE WITNESS: I would caution you that some of the names of the individuals in some of these positions might not be correct, but the chart itself is basically correct.

MR. LASKIN: Q. What we have is the present structure. We may not have in every case the present and proper name associated with the position?

20 THE WITNESS: A. That's correct.

Q. Can I just ask you with respect to the organization of the medical services division chart, which is the second last chart, where do Drs. Stewart and Dyer come in this organization?

25 A. The very first chart, on the lefthand side, under the medical branch...the director is Dr. Dowd...medical specialists, advisors and consultants.

Q. That's Dr. Stewart and Dr. Dyer?

A. Yes, plus Dr. Thacker and Dr. Haley.

I have given you a two-box thing, but they are all in here because of the size of the organizational chart.

30 DR. DUPRE: Sorry. They come in through the box that is labelled...

THE WITNESS: Medical specialists, advisors and consultants.

5 DR. DUPRE: I see. And within that box one could have full-time Board employees, of which Dr. Stewart and Dr. Dyer are the example?

THE WITNESS: Yes.

DR. DUPRE: And then the members of the advisory committee on occupational chest disease?

10 THE WITNESS: No, they really wouldn't fall into that category, sir.

DR. DUPRE: Oh, they didn't fall into advisors?

THE WITNESS: No.

15 What you are looking at is part-time consultants who come into the Board - our consultant dermatologist, for example, comes in on so-many-days-per-month basis, and would review the cases, not the advisory committee itself.

MR. LASKIN: Q. What about Dr. Ritchie insofar as he performs a consulting function...

20 THE WITNESS: A. He wouldn't appear on your chart. He is not...this is basically employees of the Board or those on contract to the Board. They wouldn't fall into this particular area.

Q. The advisory committee doesn't appear on this chart either?

A. No, sir.

25 DR. UFFEN: What would be the qualifications of Mr. Sanders, the industrial disease research specialist?

THE WITNESS: I'm sorry, sir. You would have to ask the medical people. I could find out for you. I couldn't tell you what his qualifications are.

30 DR. DUPRE: Does this chart of the medical services division tell me anything about who has the authority to appoint

DR. DUPRE: (cont'd.) say, the members of the ACOCD?

THE WITNESS: No, sir. They are appointed by the Board.

DR. DUPRE: They are appointed by the Board?

THE WITNESS: Yes, sir.

DR. DUPRE: And they would be appointed by the Board on a recommendation from somewhere, would they?

THE WITNESS: Generally speaking, on a recommendation from the medical services division, but they would consult with other experts in the field before they would make the appointment.

DR. DUPRE: So it would be a recommendation that would basically come from the desk of the executive director of the medical services division?

THE WITNESS: Yes, sir.

MR. LASKIN: Q. Can we come back to the question of appeals for just a moment, Mr. McDonald, and can we, so that we are clear, just trace through what actually happens on an appeal and what evidence is before the appeal tribunal? Just to put it in context, let's assume it's an appeal by a claimant against a rating for disability for asbestosis, of which he has agreed, and let's say he has a ten percent rating and feels it should be higher, and therefore launches an appeal. And let's take it at the appeal board stage, the three-panel tribunal.

Just so we are clear, first of all the parties to the appeal, I take it, are first of all, certainly, the claimant and his or her representative by way of lawyer or union representative?

THE WITNESS: A. That's correct. And the employer.

Q. All right. And the employer.

Is it often that an employer would actually appear at such an appeal on that kind of issue?

A. I would think rarely.

Q. So that we essentially, in most cases, just have the claimant/appellant?

5 A. It depends on the individual case. Certainly the employer is notified of every hearing and some employers choose to appear at all hearings. Other employers choose to appear at none. It's really the decision of the individual employer whether or not they appear.

10 Q. Now, is the Board itself represented at that hearing by way of, for example, its counsel?

15 A. No, sir. It would be rare for the Board to have counsel present at a hearing, other than section..the old section fifteen, which is a legal action - the right of action, whether or not the right of action is removed. In all those instances the person appearing as counsel for the Board would be a Board solicitor.

Q. That's the section...still section fifteen under the new Statute?

A. That's correct. Yes.

20 But in other cases there would very rarely be a Board solicitor present.

Q. All right.

25 Now, in terms of initial evidence before that tribunal, I take it it would have all of the material that the claims review branch and the appeal adjudicator would have had, as a starting point?

A. He would have access to all of that information. They might not necessarily have all of the information. They would be provided with a summary of the case, and the appeals administrator would have reviewed all of the case.

30 You see the appeals administrator shown down here, and would respond to any questions that the Board has.

A summary of all of the documents and copies of all

5 A. (cont'd.) the documents would be prepared for the Board members, and they could also review the claim file.

Q. Who prepares that summary?

A. The appeals administrator.

Q. Does that summary go to the claimant and his representative?

A. No, sir.

10 You have two different summaries. You have what was previously known as the summary of information, which was replaced by the access to the file, and you've got a summary of the case prepared for the board members.

15 I would indicate that if you wish to get into a great deal of detail as to the content of those summaries, you would be better advised to have the registrar of appeals respond to those questions.

Q. Fair enough.

I take it now the claimant has...he will have a copy of his file if he so wishes?

20 A. That's correct.

Q. On the appeal?

A. That's correct.

Q. Help me if you can, that file, I take it, will at least contain, number one, the opinion of the advisory committee?

25 A. Yes, sir. It contains all of the documents which have been submitted with respect to that claim.

Q. And the opinion of that advisory committee will, I take it, at least cover, number one, a confirmation that indeed the claimant has asbestosis?

30 A. Yes, they would provide a diagnosis. They would give the history that has been provided to them by the board and by the individual worker, and then they would provide a comment on the quantum as they saw it.

Q. Secondly, that he was physically impaired, and thirdly, they would put a percentage on it?

A. Yes, sir.

Q. Then would there also be any opinion from the Board's own staff doctors?

A. All of the documentation that has been submitted in that claim, either external or internal, is part of the copy that is provided to the individual worker.

Q. Now, does the appeal board, prior to the hearing, go out and ask for any further investigation to be done?

A. Very rarely. It would normally be done following the hearing in consultation...they are not sure what evidence is liable to be presented at the hearing...and then they could direct further inquiry depending on what evidence was adduced.

Q. So that the claimant then comes forward, I take it, and presents whatever additional evidence he or she feels is appropriate?

A. That's correct.

Q. Including getting in the witness box himself?

A. Yes.

Q. And he is sworn?

A. Yes, he is.

Q. Is he cross-examined by anyone?

A. No. He presents his evidence. I guess it's a case of the...it's an inquiry system where the appeal board members are required to ask him the questions that they feel are pertinent to the issue and to bring forth any evidence to support the argument, or any information which they require from the individual worker.

Q. Does the same hold true if the claimant calls a medical doctor to give evidence on his behalf?

A. Yes. He would be requested, the appeal board members would ask him to provide information.

Q. Would the appeal board itself call any evidence?

A. No, sir.

Q. I take it from what you told me earlier in the morning that no member of the ACOCD, and no WCB doctor, will testify?

A. That's correct.

Q. Can you just tell me, why is that? Is that statutory, or practice?

A. It has been practice as long as I can recall. The Board is in an inquiry, rather than an adversary system, and wish to avoid the cross-examination type of exam, if you will, that could arise as a result of that, and all of the information is there and has been presented in the case.

Q. But I take when you say it's practice, I take it that it wouldn't be open to a claimant to ask to deviate from the practice? I mean, he couldn't command Dr. Stewart to come forward?

A. No. No, sir.

Q. And he couldn't command a member of the ACOCD to come forward?

A. No, sir.

DR. DUPRE: I am just intrigued in whether there is any kind of a statutory undertaking for this. Would it be a clause in the Act somewhere that basically leaves all procedures up to the Board itself?

THE WITNESS: The Board has the power to determine its own practices, and that is the practice that they have determined.

DR. DUPRE: Does the clause that lays that down just come to your mind?

MR. LASKIN: Is it section seventy-nine?

THE WITNESS: Yes, sir. That's correct.

DR. DUPRE: Section seventy-nine.

5 MR. LASKIN: It's the same one we were looking at in respect of the establishment of the appeals adjudicator.

DR. DUPRE: I see.

10 MR. LASKIN: Q. Leaving aside the ACOCD and the Board doctors for a moment, does the appellant have the subpoena power or summons power before the appeal tribunal? And I think, for example, of a situation...suppose he wants a particular witness and the particular witness doesn't voluntarily want to come?

THE WITNESS: A. The Board will issue a subpoena on his behalf.

15 Q. All right. So that he puts his evidence in, and then I take it from what you have told me earlier it may well be the case that the appeal tribunal will feel the need for further investigation after the open hearing?

A. That's possible, yes. I would say that's in the minority of cases, however. They will usually rule on the case with the evidence presented.

20 Q. In those minority of cases, then, it's up to the appeal tribunal itself as to what additional evidence it will seek and from whom it will seek it?

A. That's correct.

25 Q. And it may or may not be the case that that will get back to the claimant?

A. Yes, that's correct.

Q. And ultimately a decision is made, and I take it reasons are...

A. Are delivered in the decision.

30 Q. Are they pro forma reasons or are they lengthy... are they an articulation of the evidence and...

A. They are an articulation of the evidence and

5 A. (cont'd.) they are fairly lengthy decisions. That practice has changed. It was rare...oh, I guess ten, fifteen years ago it would be rare to go beyond a one page decision. Now they can go up to nine, ten pages.

Q. Who writes them?

10 A. They are prepared by the appeals administrator in consultation with the Board members who sit on the individual case, and they have input into the decision, and in effect before any final decision is reached the appeal board will review the evidence that has...the decision that has been written, and amend or alter that decision as they see fit.

15 Q. So I take it then the appeals administrator would be sitting through the hearing?

15 A. The appeals administrator sits through the conduct of the hearing, yes.

Q. And does he play any other role other than to...

20 A. He would swear the witness, make verbatim notes of it, but there is a court reporter present at all hearings who prepares a formal transcript of that hearing, and it may or may not be requested following the hearing to determine whether or not there was a specific question asked that has to be answered, or what the issue may be.

There is also a court reporter at the appeals adjudicator level.

25 Q. There is?

A. And a transcript is provided to the individual parties if they pursue it to the appeal level.

Q. In terms of the decision-making process, and you told us, I take it, the appeals administrator writes, I take it, a draft of the reasons?

30 A. That's correct. He would prepare the draft decision for consideration by the appeal board members.

5 A. (cont'd.) Now in some instances, the appeal board members write the decision themselves. It's a matter of individual preference sometimes, of the appeal board. But they could call upon the appeals administrator to draft a decision for their consideration. They would basically tell him what they want in the decision and what the decision is to be, and they would ultimately sign that decision.

10 Q. Are those decisions published?

A. No, sir. They are not.

Q. Are they...if somebody wanted to look up other decisions, I take it...?

A. That isn't...that type of service is not available.

15 Q. Is there a principle behind that, or is it just a matter of expediency?

20 A. No, I don't think it's expediency. I think that we have seen the development of the reporter series from British Columbia, and they publish decisions but they are growing away from that practice and they have in effect revised some of their practices in that regard. The Board has taken the position that each case is considered on its own merit, and no precedent system is to be used, and that's part of the requirements of the Act. Therefore, they don't see much to be gained by the individual decisions, the publication of them.

25 Q. On this table, amongst these volumes, and I'm sure you recognize them, are certain claims adjudication branch manuals.

A. Yes.

Q. Which, I take it, contain a whole host of administrative directives, practice codes...

30 A. Practices and procedures. Yes, sir.

Q. For instance, containing...insofar as asbestos

Q. (cont'd.) is concerned...all of the guidelines that...

5 A. I don't think the guidelines are in the adjudication manual, but the guidelines are in part of the documentation that you would have there. Yes, sir.

Q. What role do these manuals play in this decision-making process?

10 A. Well, each individual adjudicator, at one point in time, was provided with a claims adjudication manual, and they still retain that as they come through the training system, but eventually when they actually hit the working section, there is a manual available to them within the section for reference purposes. It was, quite frankly, getting a little large. We are now into two volumes for the claims adjudicators, and to provide everyone with a manual wasn't felt to be reasonable or practical.

15 But that manual is available within the individual section for consultation.

20 It is primarily procedural - where do you go in certain circumstances - and they certainly consult with the manual, and it is available to them.

It is also available to the public through the government bookstores. They can purchase copies of the claims adjudication manual.

25 Q. Just following the appeal through for a moment, and I suppose the problem that is troubling me is this, and let's put it out and invite your comment: The evidence comes up to this appeal tribunal, and we are now talking about a percentage rating. The main evidence, I take it, that comes up...leave aside the claimant...but the main evidence from the Board's point of view, presumably, is the report of the ACOCD?

30 A. In the majority of these cases , I would suggest, yes. If the individual is pursuing an appeal they would

A. (cont'd.) present a report from their physician which they feel supports their position.

5 Q. That's where I have the problem, because I look at myself as a member of that appeal tribunal, I have on the one hand a report prepared by the ACOCD - five presumably specialists in the field of occupational chest diseases, one of whom has examined this particular person, and they put a percentage rating on it. What kind of weight can an appeal tribunal give to any
10 other medical opinion in that kind of system?

A. I would think they would have regard for the... where the evidence is flowing from, who the physician is who has prepared the evidence, what his expertise is as compared to the expertise of the other reports that have been submitted...have
15 regard for the individual himself in adducing his evidence before the appeal board, and then ultimately make the decision.

But certainly they would place a great weight upon the opinion of the advisory committee. But they are not bound by that.

20 DR. DUPRE: Mr. McDonald, our counsel has put to you a problem which he has in this regard. Now, I take it that you are familiar with the Weiler White Paper...

THE WITNESS: Yes, sir.

25 DR. DUPRE: ...and with the draft legislation that is appended to it. As I have been listening to the dialogue between you and our counsel, I have been looking at some of the provisions of the draft legislation, especially, for example, section eighty-four and so on, and I'm...in that you know this legislation I'll just ask you point blank, does it solve my counsel's problem with respect to making it possible, were this legislation to be
30 implemented, for an appellant to have an opportunity to cross-examine medical opinions that have been given down below?

I have in mind, for example...

THE WITNESS: I don't see anything within section eighty-four which would bring about the cross-examination.

DR. DUPRE: Well, I'm looking, for example, at subsection four:

"Subject to the provisions of this section, a medical review panel may receive and accept evidence at that in its discretion it deems fit, proper and essential to the determination of the medical questions before it, and may determine its own procedure in that regard."

THE WITNESS: I don't think the issue of whether or not they would be calling witnesses for cross-examination was addressed in the development of the legislation.

DR. DUPRE: I see.

THE WITNESS: I don't know what Professor Weiler's view would be on that.

DR. DUPRE: Neither do I, but just eyeballing subsection four, it seems to leave a quite open field to medical review panels as they evolve, to...

THE WITNESS: Except it isn't a medical review panel. I think they would...they might be calling the witnesses, but I don't think they would be calling a witness for cross-examination by a representative.

They may choose to consult with whoever has prepared the reports and call them to explain the reports that they have provided, but I really don't see the medical review panel acting as a hearing authority per se. They would be examining the individual and be preparing reports based on their examination of that individual and their review of the evidence. I don't see them conducting a hearing, sir.

MR. LASKIN: Q. What relationship do you see between the medical review panels, if they were put in place, and

Q. (cont'd.) the present advisory committee?

5 THE WITNESS: A. It's a separate body. The medical review panel would be invoked, if you will, on the basis of a submission that it's a medical issue that the individual is appealing and they wish to take advantage of a medical review panel.

But I...

10 Q. and the advisory committee's evidence would be before the medical review panel, just as it is now before the appeal tribunal?

A. Yes, sir.

15 DR. UFFEN : Excuse me. Is there anything in that draft legislation that would prevent the same individuals being on both panels?

20 THE WITNESS: I don't think that the individuals would be on both panels. I don't think there is anything to prevent it, but usually you are going to have a nominee from the man, a nominee from the employer and a nominee from the minister, and this would be the way..or the OMA...this would be the way the panel was created, and there would be no prior participation in that individual case by anyone who was a part of the medical review panel. No. No way.

25 DR. DUPRE: I suspect that it is explicitly precluded by eighty-two, three:

"No specialist may be a member of a medical review panel who examines workers on behalf of the employer, has treated the worker or a member of the worker's family, has acted as a consultant in the treatment of the worker..." etc.

30 THE WITNESS: I think it's quite restrictive in that respect. I just don't ...

5 DR. DUPRE: Now, to just pursue what I'm labelling for the moment as our counsel's problem, Mr. McDonald, to what extent - looking at section eighty-six on page fifty-one of the White Paper - might it become possible to cross-examine medical experts?

THE WITNESS: I wouldn't see it occurring, sir.

10 You are aware that the Weiler Report will be referred to the standing committee of the Legislature?

DR. DUPRE: Yes.

15 MR. LASKIN: Q. I take it what the thrust of your evidence is, Mr. McDonald, that from the Board's perspective you don't really see this process, this appeal process, as really being adversarial in the sense that we lawyers think of adversarial proceedings - that it is not to contain a whole panoply of cross-examination and so on?

THE WITNESS: A. That's correct.

20 Q. It is from your perspective, though, labelled an appeal, an administrative inquiry?

A. An inquiry system rather than adversary, yes. That has always been the Board's position, and continues to be.

25 Q. I suppose the claimant may have a different perspective of it.

A. I'm sure that some of the representatives who are here would have a different opinion.

30 Q. Just let me pursue the appeal, if I can, for just a moment, in the context of one other issue, and that is the basis upon which the medical evidence gets up to the tribunal, and by that I take it, if I have read Professor Barth correctly and digested it correctly and read the Statute correctly, that what the ACOCD have essentially done is looked at physical, medical impairment and put a percentage on it. Correct?

A. That's correct.

5 Q. Okay. And I take it when we are talking about industrial diseases as opposed to accidents, the Board itself does not prescribe any percentage rating systems as it has the power to do?

A. No.

Q. So that is...

10 A. For industrial hearing loss, yes. But for industrial diseases, no.

Q. And I'm thinking of section forty-three, subsection three, but the Board has not availed itself of that section in respect of asbestos-related claims, let's keep it at that?

A. No, sir.

15 Q. All right.

So that the advisory committee may or may not have its own rating criteria, but in one way or another it puts a percentage on it and that's the percentage that comes up before the appeals tribunal?

A. That's correct.

20 Q. Okay. Now, here is where I had some difficulty in reading Professor Barth, and my difficulty was whether or not disability elements, as he appeared to use that term - meaning socioeconomic considerations, played any part in the adjudicative role, either at the original level or keeping it now at the appeals level. Can you help us on that?

25 A. They would have regard for that. I think that the problem that arises in most of these situations, in the majority of the cases which have been submitted since the Act was amended in 1974, when the individual is seen, he is still at work. There is no wage loss that would be normally considered.

30 If he is not at work, in many instances he has retired so he is no longer in the work force, if you will.

5 A. (cont'd.) So that the issue of a wage loss supplement, for example, would not come into play because of the fact that the individual is still working.

Prior to 1974, the Act required that the individual leave exposure employment in order to qualify for entitlement. When the Act was changed at that time, there was an upsurge in the claims for this very reason...that the individual could continue in exposure employment and still receive benefits.

10 That was the reason for the increase in claims. At least that would be my explanation for it.

DR. DUPRE: Which provision? Sorry...what did the provision that required removal prior to 1974, apply to?

15 THE WITNESS: If the individual was filing a claim for industrial disease, prior to 1974, he could not receive benefits so long as he remained in exposure employment. That applied to asbestosis, silicosis, industrial deafness.

DR. DUPRE: Right. Okay. He could not receive, in other words, a partial disability pension?

20 THE WITNESS: That's correct, so long as he was continuing in exposure employment.

DR. DUPRE: Okay. And as you pointed out, that was removed in 1974?

THE WITNESS: Yes.

25 DR. DUPRE: Now, I find that it resurfaces or...not resurfaces, it's there...in section forty-three, five of the Act, but there the provision seems to relate to temporary disability benefits. Is that correct?

I am looking at the...

THE WITNESS: No. Forty-three, five deals with permanent disability. Forty-one, one, (b) deals with temporary, sir.

30 DR. DUPRE: Forty-one, one, (b).

MR. LASKIN: In section thirty-nine, temporary total?

5 THE WITNESS: Yes, but that's temporary total...it's a temporary partial, which I think is what he is getting at as far as the benefits in addition to.

DR. DUPRE: Okay. Well, let me really ask you to take me by the hand through this, because I am confused and eager to clear up my confusion.

THE WITNESS: Okay.

10 DR. DUPRE: Forty-three, five, as you put it, deals with temporary total?

THE WITNESS: No.

DR. DUPRE: No?

THE WITNESS: Permanent partial.

DR. DUPRE: It deals with permanent?

15 THE WITNESS: Permanent partial.

MR. LASKIN: Perhaps we should identify all of the conditions and put with them all of the statutory provisions that apply.

20 Let's, while we're on it, why don't we deal with permanent partial disability, and maybe Mr. McDonald, since you seemed to have good knowledge of the statute, you could tell us all what sections of the statute apply to permanent partial disability?

THE WITNESS: A. Let's start with the temporary total which flows from section thirty-nine.

25 DR. DUPRE: Temporary total, section thirty-nine.

THE WITNESS: That's where the individual has suffered an accident of industrial disease. He is temporarily totally disabled from the work force. His benefits flow from that section.

DR. DUPRE: All right.

30 MR. LASKIN: Q. That, I take it, contemplates that at some stage, whether it be two weeks or two months or a year, he will be back to work?

THE WITNESS: A. There will be some recovery.

Okay? Then you get into section forty-one, which
5 is the temporary partial disability section.

You have the individual who is examined by his
physician, he is declared capable of returning to some type of
modified employment. If that employment is not available to him,
the employer can't provide it, he cannot locate it elsewhere,
then the Board is empowered under the provisions of forty-one, one
10 (b) to continue to pay him the equivalent of temporary total
disability benefits...section forty-one, one (b).

Now, there are provisos under (i) and (ii), that
he has to be available for a medical or vocational rehabilitation
program. If he fails to accept employment which in the Board's
opinion is available to him, he would not qualify for that
15 particular section.

Then you go into section forty-three, which is the
section which deals with permanent disability.

Q. Total or partial?

A. Total or partial. Permanent disability results
20 from the accident. The benefits are considered under section
forty-three.

DR. DUPRE: And that is there for permanent total
or partial?

THE WITNESS: Yes, sir.

DR. DUPRE: Okay.

MR. LASKIN: Q. Section forty-three, subsection five
25 is designed to cover the situation where the physical impairment
rating does not accurately correspond to the real-life situation
for the worker?

THE WITNESS: A. Where the impairment of earning
30 capacity of the employee is significantly greater than is usual
for the nature and degree of his impairment, the Board may supplement

THE WITNESS: A. (cont'd.) the amount.

Again, you have to have men co-operating with the medical or vocational rehabilitation program which is available to him.

DR. DUPRE: There was the source of my confusion. Forty-three, five stipulates:

"Provided that he co-operates and is available for medical or vocational rehabilitation programs which would, in the opinion of the Board, aid in getting him back to work or accepted as available for employment, which is available and which in the opinion of the Board is suitable for his capacities".

THE WITNESS: Yes, sir.

DR. DUPRE: Those words almost literally repeat the provisos of forty-one, one (b).

THE WITNESS: That's correct. They were added to the section after forty-one, one (b) was introduced.

DR. DUPRE: And Roman five.

THE WITNESS: Forty-one, one (b) was introduced on the temporary disability situation. Subsequently, the Act was amended and forty-three, five was revised in this manner to enable the Board to pay the supplement.

DR. DUPRE: Now, at this point let me see if I am beginning to understand something or if I am misunderstanding to an even greater extent.

If I look at section forty-three, and I look at forty-three, one and I think of the distinction which Professor Barth reminds of - the distinction between medical impairment on the one hand and socioeconomic disability on the other - if I look at forty-three, one what I read basically is a statutory prescription that involves permanent disability, be it total or partial, and according to forty-three, one this will be determined...ah, yes.

5 DR. DUPRE: (cont'd.) The impairment of the individual's earning capacity, which would therefore mean his socioeconomic disability...if you follow Barth's approach...will be estimated from the nature and degree of the injury, which therefore means from the degree of his medical impairment. So the two are synonymous there?

10 THE WITNESS: No, I don't agree with your interpretation. Forty-three, one is strictly the impairment of the individual, not having regard for the socioeconomic factors. It's the extent of the individual's impairment.

15 DR. DUPRE: It's just those words, 'the impairment of earning capacity', but forty-three, one is really saying you are going to figure out the impairment of his earning capacity by figuring out his medical impairment?

20 THE WITNESS: You can't disregard the balance of the section. You can't read one subsection in isolation, and then you would have regard for forty-three, three, which is the ratings schedule, and it's much easier, if you will, in the traumatic case where you recognize the extent of the earnings impairment by a schedule of ratings.

Now, there are no schedule of rating as in the asbestosis cases. It's a medical judgement, if you will, of the extent of the individual's impairment, and a percentage factor is placed on that.

25 Then you would get into forty-three, five, which is the supplement where the disability is significantly greater than is the norm.

30 DR. DUPRE: And what that is really telling me at this point, I think, is that forty-three, one and forty-three, three involve rating schedules or measurements of impairment that are medical judgements.

Forty-three, five enables the Board to grant a

DR. DUPRE: (cont'd.) supplementary award for reasons of socioeconomic disability....

THE WITNESS: Partly.

DR. DUPRE: ...to follow Barth's distinction, correct?

THE WITNESS: Yes, sir.

MR. LASKIN: Q. Was your answer 'in part', or just... was your answer to the chairman 'in part'?

THE WITNESS: A. No, no.

Q. Completely?

A. Yes.

DR. UFFEN: Could I question this in a somewhat different way, sort of an operational approach? Who does what?

I'll go back to the claims review branch for a minute, and a case is coming up to them on asbestosis through one of the review specialists. Is that what he would be called, in the claims review branch?

THE WITNESS: It would come to the review specialist from the adjudication branch.

DR. UFFEN: Then to the senior review specialist and then to the director?

THE WITNESS: No, sir.

DR. UFFEN: No?

THE WITNESS: No.

DR. UFFEN: All right. What does happen?

THE WITNESS: The review specialist would...the review branch member would be the one who would be dealing with the issue.

DR. UFFEN: Oh, he would deal with it?

THE WITNESS: Only on appeal. The initial decision is made by the claims adjudicator. If the worker doesn't accept that quantum decision, then the appeal would go to the claims review branch.

5 DR. UFFEN: Well, I'm assuming for a moment that it's not the claims review board, and the review specialist is looking at it and he would by now, then, have received medical advice, assessments of disability from the advisory committee on occupational...

THE WITNESS: He would have the total file of documents in front of him.

10 DR. UFFEN: Now, I want to know this. What are the educational qualifications of a review specialist?

THE WITNESS: Anything.

DR. UFFEN: All right. Just experience and progressing.

15 Would you be able to tell me what his approximate salary range would be? I don't need to know specifically.

THE WITNESS: I would think in the twenty-five to thirty thousand dollar range.

20 DR. UFFEN: So we have medical advice coming from a man with a medical doctorate, a specialist, many years practice, earning something well in excess of twenty-five to thirty thousand a year, and this man puts that information together?

THE WITNESS: Yes, sir.

DR. UFFEN: And he has to recommend about disability against the opinion of a person with those other qualifications, medical qualifications and stature. No wonder nobody can...

25 THE WITNESS: I guess that if I were reviewing a case that was referred to me, I would certainly like to take advantage of any expert opinion that I could receive.

30 DR. UFFEN: Now, the reason why we are pursuing this at the moment is that there seem to be two aspects to disability - medical impairment..a medical, strictly medical condition...and the ability to perform a job. I think someone has used the example that if you lose your little finger it may not be too

5 DR. UFFEN: (cont'd.) serious if you are a teacher,
but if you are a violinist and it's your left hand, it might be
quite severe.

THE WITNESS: Yes.

DR. UFFEN: Now, that kind of judgement requires
information, opinion, experience of a nonmedical nature.

THE WITNESS: That's correct.

10 DR. UFFEN: And if the people in a position to
provide it are out-levered in the second order of the machinery
by about a factor of four or five...

15 THE WITNESS: I don't think that the salary issue
has anything to do with it, sir. With due respect, I don't think
the salary of the individual is taken into consideration in the
judgement decision that he is rendering.

DR. UFFEN: But still very few of these opinions
are ever overruled.

THE WITNESS: Not on the medical assessment issue,
no, sir.

20 DR. UFFEN: No, but on the disability assessment
which, it would appear, involves two things at least.

THE WITNESS: But the socioeconomic factor is a
decision that's not made on the basis of medical. It is made on
the basis of the claims we have.

DR. UFFEN: Now, who assesses the socioeconomic...

25 THE WITNESS: The claims adjudicator.

DR. UFFEN: The claims adjudicator?

THE WITNESS: Yes, sir.

DR. UFFEN: And then his view is weighed against the
medical one?

30 THE WITNESS: No, sir. It's in addition to any
medical assessment.

DR. UFFEN: In addition? But the medical people

DR. UFFEN: (cont'd.) still give a recommendation about both...

THE WITNESS: No, sir.

DR. UFFEN: ...medical impairment...oh, they don't?

THE WITNESS: No, sir. No, sir.

DR. UFFEN: Oh, I see.

THE WITNESS: The supplement is an adjudication decision in consultation with vocation...

DR. UFFEN: Just medical impairment?

THE WITNESS: Yes, sir.

DR. UFFEN: And is it in your experience that there is no disagreement about medical interpretation of disability versus impairment?

THE WITNESS: I think there is room for difference of opinion and you can have that difference of opinion, but again, I would be looking for medical advice as to the extent of an individual's physical impairment.

DR. UFFEN: But you get, or the appeals procedure gets both, doesn't it? It gets from the medical review an assessment of medical impairment, and in addition a judgement as to the ability to perform the work?

THE WITNESS: The ability to perform the work is part of the medical impairment, not a part of the socioeconomic impairment, sir.

DR. UFFEN: Well, it seems to me...we have gone around in a little circle here...I may be having trouble understanding, but we have had other medical witnesses and I asked them is there a difference between disability and impairment, and they said yes, would you like me to give you all the arguments that have gone on in the medical profession.

So I'm not asking these things just to be difficult. I'm trying to get at what kind of information gets to the appeal

DR. UFFEN: (cont'd.) board about the man's ability to do his job, as distinct from the medical impairment?

THE WITNESS: All of the information which would have been obtained within that claim file is available to the appeals adjudicator and the appeal board.

DR. UFFEN: And the medical part of it could include assessment of the man's ability to do the job, his work, am I right?

THE WITNESS: It could include it.

DR. UFFEN: Does it? I don't know...

THE WITNESS: I don't know. You would have to ask the doctor what he would include in it. I don't think that I...

DR. UFFEN: You are not the one to ask?

THE WITNESS: No, I don't believe so.

DR. UFFEN: Oh, all right. That's all right.

THE WITNESS: No. In that respect the medical assessment would be a medical advice, but the decision regarding...

DR. UFFEN: Is it medical advice because it came from a medical person, so by definition it's medical?

THE WITNESS: No, I think that you would have regard for what that individual's capabilities are. The doctor tells you that he can't bend, he can't lift over twenty pounds, he should avoid walking on rough roads, that type of thing. So he is having some input, I guess, if you will, as to the type of employment situation that the individual should avoid in a trauma case, but it's a little more difficult in these instances, and I guess you are going to say a man with a forty percent disability shouldn't be climbing up and down ladders to check a pump, or what have you.

But the doctor may comment on that, but again, it's a claims decision regarding that issue of forty-three, five.

DR. UFFEN: I will pursue these questions with the medical people, then.

THE WITNESS: Okay, fine, sir.

5 MR. LASKIN: Q. Mr. McDonald, can I just make sure
I'm clear on section forty-three, subsection five, because we have
been talking about it as a...from a socioeconomic perspective, and
my reading of section forty-three, subsection five...and maybe we
are splitting hairs here, would lead me to believe that it really
is an economic concept, and I...because what it seems to be
10 addressing is the question of whether impairment of earning
capacity is significantly greater than usual, whereas when I think
of disability in a social sense I would be thinking of the inability
of someone to enjoy his leisure time as much, to do activities
outside the workplace as much, and so on. And that, it seems to
me, is not what section forty-three, subsection five is addressing.

15 THE WITNESS: No, it isn't. It's the impairment
of the individual as far as his workplace is concerned. And I
think that Dr. Uffen, in talking about the individual with the
little finger off, if you will - quite frankly, I've never seen
one of those, but it's used as an example quite often...would be an
individual whose disability was significantly greater because of
20 his avocation, and I guess the other example that the individuals
use in the respect is a watchmaker who has his index finger
amputated, or something of this nature. His disability is
significantly greater than the general disability for that
amputation of a finger, and that is a claims decision, not a
25 medical decision.

Q. An amputated finger might rate twenty percent
on the chart, but to a watchmaker it might be everything, and
that's what this is really trying to address.

A. Yes, sir.

30 Q. I suppose what I have in mind was, I was...I
don't know whether you are familiar with it...but I was looking
at the Health and Welfare Canada task force report. Dr. Ostigay's
report?

A. I'm not familiar with it, sir.

5 Q. All right. But it talks about disability in a very broad sociocultural context where it refers to lifestyle and life patterns and leisure time and so on, and I just wanted to make sure that we are talking about the same thing, and that isn't what section forty-three, five addresses.

10 A. Quite often you will get into the situation where forty-three, five is applied. It's an individual...say he is sixty-two or sixty-three years of age, he suffers a back injury, he has been a labourer all his life. He cannot return to that particular job.

15 Then his disability is significantly greater, and in a lot of cases what they will do is they will supplement his medical pension to the equivalent of what he would have received until he reaches the normal retirement age and would qualify for CPP benefits. It's a bridging application, if you will, until the man would normally leave the work force. We don't pay them beyond sixty-five.

20 Q. What happens when you get into more subjective considerations, to use a general term? I mean, not everything is cut and dried and not every human being feels a particular injury in the same way as another, and I take it many of one's feelings are subjective in the sense you can't objectively get to them, and I suppose back injuries, it seems to me, from my point of view, are a fairly good example where, you know, many people
25 may have very subjective feelings about the way their back is and how well they can work.

Section forty-three, subsection five, is intended to get at that issue?

30 A. I think to a degree, but again you have a medical assessment of that individual, having regard for the medical findings, the limitations that they would see of the

A. (cont'd.) individual, and then you would consider the issue of a special supplement.

5 No question that backs are probably our biggest problem. Twenty-five percent of our claim volume falls into the category of back claims.

On the reopened claims, I think that the volume is upwards of fifty percent are back claims, and I think that's only normal.

10 A special supplement would be considered in those cases, but it is, if you will, a subjective decision based on a review of all of the factors within the claim, and the claims adjudicators have basic guidelines for the use of section forty-three, five and they try to follow those guidelines.

15 Q. Can we talk about the statutory qualification for eligibility under section forty-three, five? And that is the proviso section, the section that the claimant...at least, if one reads the Statute...has to meet in order to qualify for the benefits...provided he co-operates in and is available for medical vocational rehabilitational program, etc.

20 I suppose what I would like to put to you is the comment that our researcher put to us, which you may have read and which, stripped it down to its essentials, puts the claimant in a Catch-22 situation, because when he most needs the supplement is precisely in the situation where he is not able to meet the proviso.

25 A. Well, as I suggested to you, when an individual is seen for a pension assessment in asbestosis claims, the majority of those individuals are still in the work force. They have not left the work force.

30 If it's a late-rising claim and the individual has retired, again he is not in the work force and wouldn't qualify. But he is presumably receiving some other type of benefit at that

A. (cont'd.) point in time.

5 Q. What you are telling me is that when we are talking about asbestosis claims, the opportunity to apply section forty-three, subsection five hardly ever arises?

A. It doesn't arise very often - very rare.

10 A lot of those individuals would get into the section fifty-three payments, which is the special rehabilitation program which you intend to pursue.

15 DR. DUPRE: Counsel, I'm learning a great deal here. One other way of covering some of the ground that we are covering is to refer to the second document that was introduced in this folder prior to our lunch break. This is the document that is called Procedural Guidelines for Claims Adjudicators.

20 But I don't think that this document has been introduced yet.

THE WITNESS: It's part of the brief that the Board submitted, sir. It's an extra.

25 MR. LASKIN: I didn't introduce it specifically only, Mr. Chairman, because it forms part of the Board's submission to us, but if you wish we can certainly identify it.

DR. DUPRE: No, I'm in your hands and the hands of the witness. If it's proper to address what's in here at this time, there are a few things that I...

THE WITNESS: I would be glad to respond to any questions that are here.

25 DR. DUPRE: ...would like to introduce if we are going to be covering some of the same material all over again, but we are going to be looking at it really in terms of...well, from a claims adjudicator's eyeball point of view.

30 THE WITNESS: What I attempted to do was extract from the brief those areas that are particularly related to the claims services division and the claims adjudicator, and provide

THE WITNESS: (cont'd.) you with a quick and ready reference to those, rather than the total brief itself.

5 MR. LASKIN: Q. Just while we are on section forty-three, five, are the instructions to the adjudicator as to how to apply that section, are they contained in any of this material?

THE WITNESS: A. I don't believe so, no. If you wish we can....

10 Q. It's in the manual?

A. It's within the manual.

DR. DUPRE: Can I just address a few...

MR. LASKIN: By all mean, Mr. Chairman.

DR. DUPRE: ...points on these procedural guidelines?

15 First of all, under the requirements for consideration of allowance, I note first of all the history of occupational exposure to asbestos, a diagnosis of frank asbestosis, and then it states, "Advisory committee, which will be referred to further on as AC, of the Ministry of Labour has examined referred cases of occupational chest disabilities and submitted a detailed report of its findings, with recommendation on the degree of functional impairment."

20 THE WITNESS: Yes, sir.

DR. DUPRE: Now, I'm just lost on one point here. What is the distinction between the advisory committee of the Ministry of Labour and the ACOCD?

25 THE WITNESS: It's one and the same.

DR. DUPRE: Oh, they are one and the same?

THE WITNESS: I guess...I'm not sure of the names of all of the members of the ACOCD, but some of them are employees of the Ministry of Labour who carry on a full-time job within the ministry. Yes, sir.

30

5 DR. DUPRE: That is true, but you know, this may just be a slip in what is obviously just meant to be guidance for us here, but the impression that I have derived is that the ACOCD...

THE WITNESS: It's advisory to the Board, and I would suggest that...

10 DR. DUPRE: ...is an advisory board of the WCB...

THE WITNESS: Yes, sir.

DR. DUPRE: ...pursuant to a section of the Statute that I think you mentioned earlier, which is the section whereby the Board...

15 THE WITNESS: Seventy-one, three H...seventy-one, three G or...

MR. LASKIN: G.

DR. DUPRE: Oh, yes. Yes, seventy-one, three G.

20 THE WITNESS: Excuse me. Perhaps Dr. Dyer could advise you on the affiliation of the members of the advisory committee, if that would be of assistance to you in clarifying these things.

DR. DUPRE: Well, maybe I can simply ask whether he can confirm the accuracy of what Professor Barth reported concerning the membership of the ACOCD, and that I believe comes on page four two of the Barth study.

25 There he describes it as follows:

"It consists of five members, the chairman having been on the panel since 1961. All five members have at one time been or currently are employees of the Ministry of Labour or of Health."

Is that correct?

30 THE WITNESS: That is true.

DR. DUPRE: Then in addition to the five members, there are three consultants.

THE WITNESS: Yes.

5 DR. DUPRE: These three consultants are made up of two senior physicians at TGH, who hold appointments in medicine or pathology at the University of Toronto, and the third consultant is at McMaster?

THE WITNESS: I think that is right.

10 DR. DUPRE: Now, maybe when we have Dr. Stewart and Dr. Dyer later on, they will be able to explore a little bit more the respective role of actual members of the ACOCD on the one hand, and consultants on the other, and I don't want to delay your appearance here concerning that, Mr. McDonald, but I will just take it at this point that number three does refer to the ACOCD?

15 THE WITNESS: Yes, sir.

DR. DUPRE: And what this is telling the claims adjudicator is that he is to receive a report of its findings on the case with, of course, the percentage that applies to this individual, attached?

20 THE WITNESS: That's correct.

DR. DUPRE: And that is referred to as functional impairment?

THE WITNESS: That's correct.

DR. DUPRE: Right.

25 Now, at this juncture, and I may be...if I'm going too fast here, counsel, pick me up, because I just flipped to page eight where I am looking at benefits, and when I read the opening line under number nine - "Claims submitted for cancers and chest disabilities usually result in a permanent disability aware, but on occasions temporary total and temporary partial difference payments will apply," I guess the first point
30 to take away from that would be that the permanent disability

DR. DUPRE: (cont'd.) will usually be in accordance with the degree of functional impairment that the ACOCD brought in?

THE WITNESS: Yes, sir.

DR. DUPRE: And then, of course, under nine, one I see, of course, the wage-relatedness which is necessary given the manner in which Board benefits are measured - you are looking for seventy-five percent of something, to a stipulated maximum, correct? And the adjudicator is going to do that.

THE WITNESS: I think that the second part under nine is important, because that was also an amendment to the Act. It arose originally in some old silicosis claims where the individual might have been retired for many years and you would go back to the earnings that he was receiving at the time of his retirement, at the time of his last exposure.

DR. DUPRE: Right.

THE WITNESS: As a result of that amendment, the Board was able to have regard for the current earnings in that trade or occupation in establishing his permanent disability basis.

DR. DUPRE: Thank you for pointing that out.

Now, at this point I go to nine, two, and at this point you have...you draw the adjudicator's attention to the temporary total benefits, which would be based on section thirty-nine, correct?

THE WITNESS: Yes, sir. That's correct.

DR. DUPRE: So that if the individual, for example, is hospitalized, the adjudicator at that point can recommend an alteration in the level of benefits higher than the percentage functional impairment cranked out by the ACOCD, is that correct?

THE WITNESS: That's right. What you would, for example, if you had an individual who was rated at forty percent and was receiving a pension in that amount, for some reason or other he was required to enter hospital for treatment, he would

5 THE WITNESS: (cont'd.) receive temporary total disability benefits authorized by the adjudicator, less the amount of the pension that he is receiving on an ongoing monthly basis. That's correct.

10 DR. DUPRE: And basically the adjudicator is going to make that decision on the basis of his being informed, for example, that the individual is in hospital. This is not something...

15 THE WITNESS: For treatment of a compensable condition, yes.

DR. DUPRE: ...that you will refer to the ACOCD?

THE WITNESS: No, sir.

DR. DUPRE: Okay. Now...

20 THE WITNESS: The question might arise whether or not the treatment that he is receiving is for the compensable condition. Then he would seek medical guidance.

DR. DUPRE: Then he would go back to the ACOCD?

25 THE WITNESS: Normally he would go to our medical advisors and possibly...

30 DR. DUPRE: Or, sorry, to the medical services. Okay.

THE WITNESS: Not too often would it go to the ACOCD in those circumstances. It would generally be the Board's medical advisors.

35 DR. DUPRE: Now, at this point under nine, three the adjudicator's attention is drawn to the benefits that section forty-one provides, is that correct?

THE WITNESS: Yes, sir.

DR. DUPRE: Okay.

40 Now, there is one last point on which I'm lost. Where are the benefits available under forty-three, five brought to the attention of the adjudicator?

5 THE WITNESS: Well, in considering the temporary partial benefits, the permanent benefits, when the assessment is established for that permanent disability, that's the time that he would have regard for the provisions of that section.

These are not guidelines that are issued to the adjudicator per se. This brief was prepared for the Commission.

DR. DUPRE: Right.

10 THE WITNESS: As part of the adjudicator's ongoing role, he would evaluate the entitlement to supplement.

DR. UFFEN: Do I understand correctly? These were prepared for...

THE WITNESS: As a part of the Board's brief to the Commission, sir.

15 DR. UFFEN: To us?

THE WITNESS: Yes, sir.

DR. UFFEN: But the adjudicators have been using these for some time?

THE WITNESS: Not in this format, sir, no. Not at all.

20 DR. UFFEN: Well, this isn't what an adjudicator sees he is supposed to do, then?

THE WITNESS: No, sir. Within the claims manual I suggested to you that all the procedural guidelines were contained.

DR. UFFEN: It might be different from this?

25 THE WITNESS: In terms of procedure, yes.

Like, as part of his assessment of the permanent disability case, when he receives the report from the ACOCD, then he would have regard for what are the man's activities at that point in time, is he still in employment, does he have a wage loss. And he would establish that in considering...

30 DR. UFFEN: All right. I may have misunderstood. We have in front of us Procedural Guidelines for Claim

DR. UFFEN: (cont'd.) Adjudicators - Asbestosis.

THE WITNESS: Yes, sir.

5 DR. UFFEN: And that was written for presentation
to us?

THE WITNESS: That's correct.

DR. UFFEN: But the adjudicators themselves don't use
this?

10 THE WITNESS: No, sir.

DR. UFFEN: Then perhaps we should be seeing what
the adjudicators understand...

THE WITNESS: It's in the manual, sir.

DR. UFFEN: It's all in those manuals?

15 THE WITNESS: Yes, sir.

This was an attempt to provide the Board with a
summary, perhaps a little more concise than perhaps what is in
the adjudication manual.

20 MR. LASKIN: I have availed myself of one of
the outside experts who knows these manuals - Mr. McCombie,
who has pointed me to the directive on section forty-two,
subsection five, which...it might be helpful if we all had at
least in one place...

DR. DUPRE: Are you suggesting this might be an
appropriate moment to make a few copies?

25 MR. LASKIN: It might be a convenient time to take
a break.

MR. McCOMBIE: Can I, just for the record, I realize
this may get confusing, but the section numbers did change, so
when Mr. Laskin is saying forty-two, five, that is, as was in
the claims manuals under the RSO 1970, so we are now referring
to forty-three, five, just so there isn't any confusion.

30 DR. DUPRE: I am, myself, juggling both an RSO 1980,

DR. DUPRE: (cont'd.) and 1979, and it breaks my heart but I have to do it twice.

5 THE INQUIRY RECESSED

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THE INQUIRY RESUMED

DR. DUPRE: Are we ready?

10 MR. LASKIN: I think so.

DR. DUPRE: Counsel.

MR. LASKIN: Q. I take it, Mr. McDonald, what we have in front of us is the directive issued by the Board, or a series of directives issued by the Board on the application of section forty-two, subsection five?

15 THE WITNESS: A. Current...

Q. Then forty-two, subsection five and now forty-three, subsection five?

A. That's correct.

20 Q. Looking at the first page of this document, is it the pensions adjudicator?

A. Pensions adjudicator - in this case the industrial disease and dependents adjudicator who would make that determination.

Q. It's made by the same person who makes the adjudication on compensability, period?

25 A. That's correct. In the cases of industrial claims. In the trauma claims there is a separate pensions section.

Q. I see.

30 A. We had them on the board before, but in industrial claims they are responsible for determining the permanent disability of the worker.

5 A. (cont'd.) One thing I would like to say with respect to this section - it has been the subject of considerable controversy and discussion before the House, before the select committee, with the ombudsman, and the Board's position has not changed in that respect, and I understand that there is still some possibility of pursuit by the ombudsman, but I'm not exactly sure of the status of that at this point in time.

10 DR. DUPRE: You are referring here, Mr. McDonald, to situations that Professor Barth describes, if I remember correctly, at pages nine point three and nine point four?

THE WITNESS: Yes, sir.

15 DR. DUPRE: Okay. And incidentally, what is related at pages nine point three and nine point four, including the paragraph that runs over from nine point four to nine point five, would be an accurate rendering of the situation?

THE WITNESS: Yes, sir. I think that the ultimate recommendations in Professor Weiler's White Paper and the adoption of the legislation could have an impact on this.

20 DR. DUPRE: Mr. McCombie?

MR. MCCOMBIE: Sorry to interrupt, but just a couple of things, because I have been involved to some extent in this, and first of all I think that this nine point three and nine point four deals with forty-three, one, does it not, Mr. McDonald, rather than forty-three, five?

25 If I remember the ombudsman's recommendation on these cases, it dealt with the way that the Board adjudicates section forty-three, one, rather than forty-three, five.

THE WITNESS: I am looking at forty-three in total, but yes, okay.

30 MR. MCCOMBIE: I see. The other thing that I would...I make this suggestion and I realize I'm out of turn here, but I know I have seen the ombudsman's interpretation and the legal

5 MR. McCOMBIE: (cont'd.) reponse that the Board solicited, and I think that might be of some help to the Commission, and if I'm out of line, please say so, but I think it might be some help in interpreting section forty-three, one.

THE WITNESS: If the Commission so wishes, I will...

DR. DUPRE: Would it be possible to have this made available? We would appreciate it.

10 MR. LASKIN: Q. Can you tell us who was the counsel that the Board did employ to render an opinion?

THE WITNESS: A. Mr. Robinette, and on behalf of the Ministry of Labour, Mr. Leland.

15 MR. EDWARDS: Just so I can understand, Mr. Chairman, are we talking about the legal opinion which was provided by the Board, or the report of the ombudsman?

MR. LASKIN: We are talking about (a), the report of the ombudsman, and (b), the legal opinion or opinions that the Board sought in response to the ombudsman's report.

THE WITNESS: Having to do with section forty-three.

20 MR. EDWARDS: I understand that. Are you requesting that we produce the legal opinion that was produced on behalf of the Board?

MR. LASKIN: Yes.

THE WITNESS: They are a matter of public record. They were tabled in the House, Mr. Edwards.

25 MR. LASKIN: Can we, Mr. McDonald...we are all content to leave section forty-three for a moment...can we...

30 DR. DUPRE: Yes, but I think a signing-off point that would be useful to me would be the following: Could I just make the following statement and ask you to respond? It would simply be the following: From my understanding of the Weiler draft legislation am I basically correct in taking away the impression that this lays a number of matters to rest, at least with respect

DR. DUPRE: (cont'd.) to the current, if I may call it entanglement, of impairment - medical impairment and socioeconomic disability, as Professor Barth describes it?

THE WITNESS: Well, I guess you could get right down to the implementation or the impact of Weiler's recommendations and how they are ultimately accepted.

He is proposing a lump sum for impairment per se and a continuing wage-loss payment. Just exactly how that is going to come in the final legislation remains to be determined.

DR. DUPRE: Well, indeed, for that matter you could have some impairment pensions coupled with some socioeconomic disability pensions. There are any of a number of formats, I'm sure, that can be put forward here.

But either way, you see...I just want to put this to you baldly, Mr. McDonald, as someone who is very knowledgeable in this area. As, at the moment, someone who remains an amateur but is going to have to become a semi-pro at least, shortly, my impression of the Weiler White Paper is its net impact if it were to be reflected in legislation to any appreciable degree, would be, when all is said and done, to reduce somewhat the overall importance of the decisions that are made by the medical people, and enhance somewhat the importance of decisions that are made by claims adjudicators, because as I would understand it, once you get into the whole business of socioeconomic disability pensions, the whole business of deeming income, of deeming income, for the purpose of calculating socioeconomic disability pensions, you are quite a long way from the medical realm.

Now, am I out of my tree on that one?

THE WITNESS: A little bit.

DR. DUPRE: Okay.

THE WITNESS: You made the statement, sir.

DR. DUPRE: I appreciate the frankness of your

5 DR. DUPRE: (cont'd.) remark and I would simply try to invite you to tell me how the hell I climb down from the tree which I've apparently fallen out of it.

10 THE WITNESS: Well, we are currently in the process of attempting to develop some guidelines, if you will, for the deeming process. The only other jurisdiction that has that at the present time is Saskatchewan, and Saskatchewan's total approach was not too great because the review committee told them to go back and do it again. That's my understanding of the process.

15 They made a deeming decision, but in the opinion of the committee it ignored a lot of factors and we are trying to avoid that concept.

20 Again, in a lot of instances you are going to have a subjective decision as to what that individual is capable of doing, and to say he is capable of doing something and is that employment available to him in the community in which he lives, or where you are going to get...there are still going to be some conflicts and some disputes. You are never, ever going to resolve that where you are making a subjective decision on that type of thing, but we are certainly attempting to come to grips with it and we will be utilizing our field staff as much as possible to interview the man to go into the work situation which has been offered or is possibly available to him by his employer, but that's a little ways down the road, but we are attempting to address it at the present time.

25 So I don't think that Weiler per se is the be all and end all of any disputes that are going to arise relating to compensation. It just isn't going to happen.

30 Now, sure, you are going to create the medical review panel which will give you, if you will, an independent decision. You are going to, if legislation is adopted, create the

5 THE WITNESS: (contd.) independent appeal board which will be divorced from the Board per se, but you are still going to have individuals making decisions on the basis of evidence presented, and not everybody is going to be happy with those decisions.

10 You know, they have, in effect, an independent appeal board in British Columbia. Not everybody is happy with the decisions that are made by that appeal board in British Columbia, so the creation of an independent body removes it from the Board, and you are saying okay, that review is going to be conducted by someone independent of the Board, and they make that decision, that's fine.

15 But again, it's an individual making a decision based on the evidence presented to him. That's all I wanted...

20 DR. DUPRE: That is correct, Mr. McDonald, and I will now, out of my tree as I am, of course, hazard the following hypothesis, which is: In a hard-nosed public administration sense, if you are talking about the implementation end of things, I mean what goes on after the legislation is written, whatever the legislation may say, there is on the conditions of uncertainty, very often, a quite-natural propensity to look to highly professional and scientific sources of knowledge for matters which perhaps should not be there, but nonetheless will be sought from those quarters precisely because of the necessarily controversial impact of the decisions involved.

25 THE WITNESS: One problem that you are faced with in this issue - asbestosis, and you people are much more aware of it than I am in terms of all of the evidence that has been presented to you, is that it is a very imprecise science, and to suggest the creation of medical review panels will necessarily have the expertise to resolve these problems is great in theory, 30 but where are all these experts? That's the hard line that you

5 THE WITNESS: (cont'd.) come down to. Where do these people come from that are at a level up here? It isn't easy, no question of that, sir.

10 The Chairman made a comment in a speech before the Industrial Accident Prevention Association back in April of 1981, where he said that the Board would be pleased to have some type of partial causality for recognition of some of these diseases, and he was looking to Professor Weiler, in phase two of his study, to bring forth something of that nature.

15 Now, it isn't here yet, and in the Board's opinion we don't have the authority under the existing legislation to accept that. That's the hard-nosed that we are faced with, and if Weiler can come down and give us what we feel is the legislation that would enable us to do certain things, all the more power to him because it makes our job that much easier.

I'm sorry.

DR. DUPRE: Thank you.

Counsel?

20 MR. LASKIN: Q. Can I just pursue that matter, because I think it dovetails with the next issue that I wanted to discuss with you? Can you just help me on what your Chairman meant by partial causality?

25 THE WITNESS: A. Well, I guess you are into a black-and-white situation at the present time - either the disease is or is not caused by the employment. There may be some partial contributory cause of the employment to the ultimate disease, and if that type of legislation could be developed which would enable the Board to grant benefits, fine. But again, then you get into the issue of does the Board grant the total benefits that flow from the legislation, do you create a separate fund from which these
30 benefits would flow so that not all of the costs of those benefits are a charge against the employer where only a portion of the

5 THE WITNESS: (cont'd.) disability might have flowed from - some of it may have come from other nonemployment contributing factors - where do you go with this? Who pays the ultimate cost? Is it fair for the employer to pick up the cost?

10 Let's use, for example, an industrial deafness case where you know that the individual has other exposure which is contributing to his industrial deafness. I guess one of the worst ones is the man who is using the snowmobile. How much of the man's personal life contributes to the disability as compared to his employment exposure, and what can you accept and how do you split that off? What can you actually contribute the disability to?

15 If the situation is there where you can accept the total part and perhaps fund part of it to another fund or have a special fund which would enable you to do this, fine.

But I don't think it's there, exists in the legislation.

20 If the man can establish exposure in the employment to high-level noise, then we will accept that portion and try and pin it down.

25 In many more instance now, the employers are arranging for pre-employment audiometric testing and they have regard for that when the final assessment is made - how much did the man have when he came to us. You see the people walking around all the time with these plugs in their ears, and I've got two kids who just about blow me out of the house with their stereo, and I'm sure that they've got to have hearing problems when they get a little older.

Maybe I'm a little philosophical on this discussion, but that's where it's at.

30 MR. LASKIN: Q. Can we follow up what I think is that issue in terms of death claims? Now, as I understand it,

Q. (cont'd.) looking at the scheme of the Statute, the basic provision in respect of death claims is section thirty-six?

5 THE WITNESS: A. Where it results from an injury. That's the benefits that flow.

Q. All right. So that leaving aside any other sections for a moment, to be entitled as a survivor, a dependent, to benefits, the death has to result from an injury?

A. Other than section forty-three, seven.

10 Q. Section forty-three, seven says that if you have got a hundred percent rating for a disability...

A. Notwithstanding the cause of death, the benefits flow.

Q. It's presumed that death results from...

15 A. No, no.

Q. It's presumed that the benefits flow?

A. The benefits flow. It is not presumed the death is from...the benefits flow.

Q. Just the benefits flow.

20 A. You can have a hundred-percent pensioner who is killed in a car accident, nothing to do whatsoever to do with the cause of death, the benefits flow because he was in receipt of a hundred percent pension, and that's from forty-three, seven.

Q. And anything less, you must satisfy the requirements of section thirty-six?

25 A. That there is a relationship between the death and the injury.

30 Q. Now, I suppose the question that arises is how broadly or how merrily one interprets entitlement in terms of whether a death results from the injury, and I think of this problem in terms of the manner in which it has been put to us - what do you do with the situation where the particular individual may have several interacting medical conditions. He may have a rating

5 Q. (cont'd.) that is twenty or thirty percent, he dies, the cause of death on the death certificate does not say asbestosis but it says some cardiovascular disease.

10 What I would be interested in, if you could help me on it, is what kind of approach does the Board take, and are there any Board directives that address the question as to how narrowly or how broadly the Board looks at that question of entitlement?

15 A. I don't believe there are any specific directives that address the issue. In the individual case, the adjudicator responsible for the handling of the claim would attempt to seek any evidence that he could as to what the cause of death was and what the relationship was to the compensable condition - be it an industrial disease or what have you, and I guess that's the area that we should stay with.

20 In the silicotic, the asbestotic, if you get into the right-sided heart failure, if you will, then you would be looking at entitlement. But if the man had a generalized cardiovascular problem - stroke or what have you - no, you would not normally be accepting any relationship between the compensable disease and the cause of death.

25 Q. Can I take you to what Professor Barth said about that issue? Can you look at pages nine point five and nine point six, and looking at the second full paragraph on nine point five,

"The ACOCD and the medical services division appear to give little, if any, consideration to the extent to which the asbestos-related disease has aggravated or interacted synergistically with some other medical condition."

30 This may more properly be a question I should direct to the doctors, but from your experience at the Board and from your

5 Q. (cont'd.) experience in running the claims adjudication side of the Board, can you help us as to whether that is a fair statement?

A. I think in some of these instances it is very difficult to divide one from the other, but I can't totally accept Barth's comment, but I would suggest that the question should really be addressed to the medical people who do have regard for all of the conditions when they are assessing it.

10 No, I would...in my own personal experience I would suggest that they do take that into consideration, but you ultimately come down to an assessment of what they feel the extent of the individual's disability is from the compensable disease.

15 In some of them, it's very hard to divide, and whether you say the man has forty percent because of his asbestosis or fifty percent because of his asbestosis, it's a subjective decision based on their best possible judgement.

How you come down with it any finer than that under the existing legislation, I don't know.

20 Q. If we come back to the submissions that the Board made to us and the documents that you so kindly brought this morning and the Chairman referred to, if you look at paragraph nine point four in your dependency benefits, what you are asking the adjudicator to do is consider whether the cause of death was due to asbestosis, and there is nothing in there which suggests whether it was, for example, due directly or indirectly to asbestosis. There is none of that, if I may put it more...in
25 broader language that might suggest a more liberal approach to that question?

30 A. I think it is a...I guess, if you will, in preparing some of the information for the brief you have regard for the general day-to-day statement -is it due to asbestosis.

Now, there are other things that can be directly

5 A. (cont'd.) related to that asbestosis. I mentioned the right-sided heart failure, which again you should ask the medical people to comment on. The man's death is not directly due to asbestosis, but to right-sided heart failure is due to asbestosis, and the claim would be accepted as such.

10 The individual who develops lung cancer in the presence of asbestosis, or without asbestosis but in the asbestos-exposure employment...I guess it's better to look at the one with asbestosis who also has lung cancer...the death is due to lung cancer, not asbestosis, but that would be accepted as due to the lung cancer due to the compensable condition.

15 I don't know that I'm fully answering your question, but maybe it's a little narrow in saying the cause was due to asbestosis. I think it's a little broader than that in the actual interpretation and consideration of the individual claim.

What did cause the man's death?

20 Q. Does the Board give any specific instructions or directions as to its medical services branch, as to what criteria to apply, what legal criteria or policy criteria to apply in making that determination under section thirty-six?

A. No.

Q. The medical people have the Statute, and that's what they are working from?

25 A. They would have regard for the original diagnosis, the diagnosis at the time of the death - wherever it came from, whether it came from the death certificate, from the attending physician, from the autopsy, from the hospital records. You would attempt to get all of the information that you could regarding the cause of death, and make that ultimate decision.

30 DR. DUPRE: Could I just follow up on counsel's questions with respect to nine, four? I'm trying here to, again, understand the position of the claims adjudicator.

5 DR. DUPRE: (cont'd.) When I go back to the requirements for a disability allowance, which are on the front page, what I saw there was that the claims adjudicator would have to be able to have a history of occupational exposure - that he could do himself. At this point a diagnosis of frank asbestosis is, of course, something that the adjudicator would come by as a medical opinion...it could be from the individual's family doctor, and then of course the first thing he has to come by is the ACOCD rating.

10 THE WITNESS: But bear in mind that generally when the decision is being made regarding the fatal accident, entitlement has already been established for the asbestosis condition.

15 DR. DUPRE: Oh, I grant that. I'm just trying to review once again the medical input that the adjudicator has on the pension.

Now, when I turn to nine, four, I see that the first point that is made is in case of death, "consider whether the cause was due to asbestosis".

20 Then it says:

"Send a memo with a recommendation to the consultant - chest disease."

25 Now at this point I am trying to understand what it would be that the adjudicator would have in front of him when he is considering whether the cause of death was due to asbestosis, and at this point I am wondering if I have found the answer in part on Professor Barth's page three point seven, where he mentions the death certificate along with pertinent hospital records, then notes a disturbing disparity in the stated cause of death between the death certificate and the registrar general's form.

30 Just in terms of trying to gain an understanding of what is going on in the case of dependency there, do I take

5 DR. DUPRE: (cont'd.) it that the claims adjudicator, of course, would be one of the very first to find out that someone in receipt of a disability pension had died?

THE WITNESS: He is usually the first.

DR. DUPRE: The first. And along with being the first to discover that the individual has died, he is probably the first individual who sees the death certificate?

10 THE WITNESS: He would request the death certificate from the...

DR. DUPRE: He would request the death certificate.

And it's at this point that, presumably, he sends his memo to the consultant - chest disease?

THE WITNESS: No, sir.

15 DR. DUPRE: No?

THE WITNESS: He would generally be looking for additional medical evidence regarding the cause of death, whether that necessitated local investigation, requesting the hospital records or getting a report from the coroner - we have a form that we would send to the coroner, - or the physician who was in attendance at the time of death.

DR. DUPRE: Okay.

THE WITNESS: So it isn't just solely on the basis of that death certificate and then a recommendation of the...he would make the inquiry.

25 DR. DUPRE: At this stage of the game the claims adjudicator seems to have a fairly substantial role.

THE WITNESS: Yes, sir. He is charged with the responsibility of assembling the evidence.

DR. DUPRE: Now, that seems to be a rather larger role than he plays in the decision with respect to a disability pension, does it not?

30 THE WITNESS: I don't believe so.

5 DR. DUPRE: I'll tell you, the reason why I got that impression was that when I look at the disability pension situation, what strikes me is that once he has established the history of occupational exposure - which in many cases is, I think, relatively straight forward given employment - what he only has to do is be satisfied that somebody, some medical practitioner diagnosed asbestosis, and then off it goes to the medical side.

10 Whereas in dependency benefits he seems to have to do a lot more searching around before...no? It's just a misimpression, then.

THE WITNESS: In both cases he has to assemble the evidence to enable him to make the recommendation and the decision.

15 DR. MUSTARD: But would the difference be that in the case of death you know there would be a series of records - there will be possibly a hospital record, a physician's record whereas when the other condition comes in, it would come in with a package and there would unlikely be that other information. If it did exist, he would have to dig it up in the same manner as he does for a death benefit consideration, but it's just because it's a slightly different...well, it is a different circumstance in terms of the amount of information that he can try to extract.

20 THE WITNESS: Well, I would think so, because usually when you are getting into the death situation the man has been hospitalized - not necessarily so, or he has been seen by the coroner.

25 But in a lot of the instances, depending upon the disability, there has been a period of hospitalization and he knows he could get those records.

30 Now, in some of the questionable claims for disability initially, again there has been an investigation because there is some question as to what the disability is, and

THE WITNESS: (cont'd.) those records may be available in those cases as well.

5 So it depends a good deal on the individual case - what evidence is available in those instances.

The suggestion has been made that in every case the Board should get an autopsy report. Well, the Board doesn't have any power to order an autopsy.

10 Sure, we appreciate the autopsy report, it's of great assistance to us, and a lot of the physicians, I guess in the old days in the mining area in Timmins and Kirkland Lake, the physician who was in attendance had usually been attending that individual for some considerable period of time and he would quite often suggest that they, we really should have an autopsy in this case, and it was of great help in deciding, if you will, the
15 ultimate cause of death.

MR. LASKIN: Q. May I ask you from your obvious knowledge of the Statute and your experience at the Board what, if you know, was the rationale for having section forty-three, subsection seven on the one side, and section thirty-six, subsection
20 one on the other? I mean, just coming to it fresh as I have, it seems to be a very much all-or-nothing dichotomy.

THE WITNESS: A. This specifically arose out of very seriously disabled workers - a hundred percent - most of them coming out of the mining camps in the north. They would die, their cause of death would not be related to the compensable
25 condition and the decision was made that there should be a catch-all to enable to the Board to pay fatal benefits in those cases.

Q. To pay?

A. Fatal benefits in those cases.

30 In a good many instances, it was suggested that the individual, because of his one hundred percent permanent disability rating, was unable to achieve other insurance benefits.

5 A. (cont'd.) Bear in mind that for the most part the silicotics live a long time, and they may have been exposed to this condition for some period of time.

10 Sure, you are going to get the odd guy who has a very rapid increase of the disease and demise, but for the general part I would suggest that their life expectancy is probably as great as or greater than yours or mine. You might want to ask the medical people to comment on that when they are, but that was part of the rationale behind this.

15 You had an individual who for many years was in receipt of a hundred percent pension, and all of a sudden he is gone and the widow is left there and there are no benefits because it ceased with his death because the death was not due to the compensable condition.

A decision was made in the Legislature to enact forty-three, seven.

20 DR. DUPRE: When was twenty-three, seven (sic) enacted, by the way? Would you roughly recall?

THE WITNESS: No, I would have to check.

DR. DUPRE: Okay.

THE WITNESS: I'm sorry.

DR. DUPRE: But it has been probably a matter of the last twenty or so years?

25 THE WITNESS: Oh, yes. It's within the last twenty years...it's within the last twenty years, between twenty and twenty-five years, I would suggest.

I can get that information for you as to when it was added.

30 DR. DUPRE: And then there is the other side of the question that has to do with section thirty-six, counsel?

MR. LASKIN: Q. I take it...do I understand it correctly, Mr. McDonald, that section forty...what is now section

5 Q. (cont'd.) forty-three, subsection seven, came in to cure what the Legislature perceived to be a difficulty arising out of the strict application of section thirty-six, subsection one?

THE WITNESS: A. Yes, sir.

Q. And the legislative decision at that time was made to deal only with the hundred-percent disabled, and not...

10 A. Not eighty, not seventy-five, not seventy. One hundred percent. That's correct, sir.

15 Q. Can I ask you just one other question about the temporary disability payments, and perhaps you can clear this up for me. In terms of industrial disease, asbestos-related diseases, do they have any role to play where, for example, you determine to remove an asbestos worker from employment at an early stage, perhaps as a result of identifying an asbestos fiber dust effect, and then moving that employee into another occupation which, say, carries with it less salary?

A. If you look under page eight, nine, three - temporary partial.

20 Q. Mmm-hmm.

A. The individual does suffer a wage loss and then he has to be assessed for a permanent disability, although it has been established that he has a compensable asbestosis condition. You would pay that wage loss on a temporary partial disability, but again, I would suggest to you that it doesn't occur very often.

25 Usually when the individual is seen by the advisory committee, he would be assessed for a permanent disability award, and that award would be granted, and the individual would generally continue in the same occupation.

30 Now, if he moves to an occupation where there is a wage loss which can be related to his disability, then he can receive a supplement over and above his pension payments.

He can receive temporary partial disability, but

5 A. (cont'd.) it doesn't occur very often. That's what I am saying, that the individuals are generally working, generally maintaining their wages, then he would receive the pension, period.

Q. Can you help me with this? You have a..when I say 'you', the Board has a category which it calls asbestos fiber dust effect, which I understood in and of itself is not compensable.

10 A. It isn't a recognized diagnosis per se in the medical community, and the term that the Board developed to recognize that there was a condition there which could be a precursor, if you will, to asbestosis, and the decision was made that if the individual was found to have that asbestos fiber dust effect, he would be offered entry into the special program if he chose, or if he was not already removed from exposure employment.

15 DR. DUPRE: Incidentally, am I correct in understanding that the decision to come up with guidelines for dust exposure was part and parcel of the larger decision to have the rehabilitation program? In other words, you needed some dust effects guidelines so as to establish who could be eligible for the rehabilitation program?

20 THE WITNESS: The special program originally arose out of Elliott Lake, where an individual had achieved a certain number of working level months. The program was created for that specific need.

25 It was suggested that it should be expanded to take in mineral dust effects...in other words, a silicotic - and again a silicotic at that point in time was primarily the Elliott Lake silicotic, or a code five, which is...well, it's code four, which is approximately the same, if you will, of the asbestos fiber dust effects, in general terms.

30 So it was created there, and then it was agreed that it should be expanded to others beyond the Elliott Lake

5 THE WITNESS: (cont'd.) situation. How could you isolate Elliott Lake, the mining camp, from all other industries where this might occur?

10 You can have the foundry worker who has the same thing because of exposure to silica dust, or you eventually get into the Johns-Manville situation where the individual has asbestos fiber dust effects, and the majority of these people came out of the Johns-Manville area.

15 So it was...I guess, if you will...an extension of the special program and the defining term of asbestos fiber dust effects was developed to enable these people to qualify for the program, and they qualified whether they had that or whether they had frank asbestosis.

20 DR. DUPRE: Right.

25 Now, I guess that my question was really just meant to, in a way, elicit your opinion of the accuracy of what Professor Barth has to say about all of this. Let me just bring to your attention portions of the specs where he deals with this. On pages five, six; five, seven and five, eight, he describes the asbestos fiber dust effects guidelines and his description of the guideline at pages five, seven and five, eight is prefaced with the statement at the bottom of page five, six:

30 "On May 11, the WCB approved a special rehabilitation program for workers suffering from either asbestosis or pre-asbestotic condition called asbestos fiber dust effect.

In conjunction with this effort, the WCB issued medical guidelines."

35 So can I take it from this just to start off with that the idea of having a special rehabilitation program was the reason why medical guidelines has to be developed that would deal with the pre-asbestotic condition as distinct from the asbestosis

DR. DUPRE: (cont'd.) which you already had in place?

5 THE WITNESS: Well, yes and no. Because the program at Elliott Lake specifically said Elliott Lake silicosis - it did not mention asbestosis - but when they got into developing a program for Johns-Manville, it was expanded to mineral dust effects, and that's the final guidelines that is now available, it's mineral dust effects, so that you have the broad spectrum, and the term asbestos fiber dust effects was developed at that time.

I don't think you will find it in any other literature beyond our Board. I just don't think it's a recognized medical term. Again, maybe Dr. Dyer could...

15 DR. DUPRE: I guess the point I simply have in mind is, if all the Board had wanted to do was to have had a rehabilitation program for asbestotics, it would not have had to have developed AFDE guidelines, correct?

THE WITNESS: That's right.

20 DR. DUPRE: And it's once you decide to include people who might have a pre-asbestotic condition, in a rehabilitation program, that it follows that you've got to develop...

THE WITNESS: The asbestotics already qualified for our rehabilitation program.

DR. DUPRE: Okay.

25 THE WITNESS: So it was to recognize the others, that's correct.

30 DR. DUPRE: Now, while we are just dealing with Professor Barth, I just want to go to his next mention of it, which is at pages eight, two and eight, three, where he again describes, on page eight, two, the background of the program in the Elliott Lake situation, which dovetails with what you have said.

DR. DUPRE: (cont'd.) Then he goes on, on page eight, three, to say:

"A primary source of objection to the SRAP came from the medical services division of the WCB. The roots of these criticisms were, and continue to be, certain basic medical issues.

First, how does one identify or define the AFDE condition?"

Now, do I take this, first of all, as simply an accurate description, and secondly as alerting me to the fact that it must have been very difficult indeed to devise the guidelines whose text appears on page five, seven?

THE WITNESS: I think you would have to ask the medical people. I think that, frankly, the guideline was developed as a result of the research that they did, and I think that Professor Barth's comments relate to his conversation with the medical people and the expediency of the program. That's perhaps a personal opinion, and I don't necessarily agree with it.

DR. DUPRE: Thank you, Mr. McDonald. That's helpful.

Counsel, please.

MR. LASKIN: Q. Just...I appreciate your evidence in response to the Chairman's questions as to the reason for developing this criteria, but can I ask you, it now being in place, the asbestos fiber dust effect...which is a pre-asbestotic condition...

THE WITNESS: A. It may or may not be.

Q. It may or may not be, but it may be some indication that something may be there?

A. That's correct.

Q. All right. If I am a worker and that condition

5 Q. (cont'd.) has been identified, does it enable me to transfer to another job, not within your rehabilitation program...say I don't want to take advantage of your rehabilitation program, but I'm able to secure other employment, and do so...and that other employment causes me a loss of earnings, does it enable me to apply for some temporary disability payment?

10 A. No, because you don't have a condition which is diagnosed as compensable.

15 Q. So I must, if I have that precursor condition, I must, in order to utilize whatever the Board offers me, I must take advantage of the rehabilitation program?

A. The Board's program.

20 If you could identify to the Board's rehabilitation people that, hey, on my own I have gone out and I have been successful in locating possible employment, then the rehab people would certainly work with you to get into that.

I'm not aware of that situation...

25 Q. That's what I wanted to know.

30 A. But again, I think that you would perhaps be better to address that question to Mr. Pearce when you are pursuing the special program.

Q. Does it...just one other question...does it also serve the function, the identification of this condition, as a marker, if you will, to the medical people or the advisory committee people that sayin a year's time or two year's time they should reassess this particular person?

A. Those individuals are subject to continuing monitoring, yes.

35 One other comment I would make about the special program, and it refers back to some of the comments that were in Professor Barth's report, and that is, is there truly any benefit out of removing the individual from exposure employment? That's a

A. (cont'd.) dispute.

I guess the opinion has to be, we really don't know. But, if any one individual has benefited from that removal and has not developed the disease, you've got to be ahead of the game.

Q. Well...

A. And I don't know how you will ever determine that.

Q. I'm just, in fact, looking at the Board's own submission on that very question, and I'm looking at page three of your submission, at paragraph two point zero, and just reading here the last sentence of that paragraph:

"There is no certainty that removal from exposure will prevent progression of changes, and there are no means of identifying those persons at risk who will progress, but it seems reasonable to assume that the earlier the removal, the less will be the chance of progression."

That is the Board's position?

A. Mmm-hmm. Yes, sir. That's correct.

Q. Are you able, Mr. McDonald, you seem to have noted Professor Barth's comments on the actual special rehabilitation program at Johns-Manville, and are you sufficiently knowledgeable about that program to tell us whether Professor Barth's description of what happened is a fair and accurate one?

A. I think there was a lot of controversy about the introduction of the program, but again I would say that if any one individual benefits as a result of entry into that program, then the program was worthwhile, and some of those individuals are still being carried on under that program, and in the absence of any diagnosed asbestotic condition.

I don't have figures on the numbers. Mr. Pearce

A. (cont'd.) may be able to provide you with those figures.

5 Q. What about the other comments that Professor Barth makes about the program, in which he...and could I take you to the description of it that begins at about page eight point two and runs through eight point eight?

10 A. I think I would prefer that you address your comments to the individuals who are more directly involved with the special program. If there is any specific thing that you want me to comment on, I'll certainly attempt to do so.

15 Q. Well, what about the comparison that he draws between the Elliott Lake program on the one hand, and the Johns-Manville program on the other, and one of the factors he points to is, for the success of the program at Elliott Lake, is perhaps the availability of alternative employment on the top side of the mine, as it were, and I take by inference the lack of such...

20 A. I don't think there was a lack of alternative employment, because I think a lot of the people were removed from exposure employment within Johns-Manville, but again you get into the debate as to what is and what isn't exposure employment.

25 Some of the people took the position that the individual in every case should be removed from Johns-Manville. To me, that just isn't reasonable. If the individual has had his career at Johns-Manville, has a lot invested in that company in terms of benefits that are available to him, why should he leave that employment when there really is no proof, if you will, that his condition is going to regress as a result of staying with that company in what is determined to be nonexposure employment by the...the inspection is done by the ministry, and on the best advice that the Board has available to it.

30 That's perhaps a personal opinion, but it's

5 A. (cont'd.) nonetheless one that I am prepared to support.

Q. Who was responsible for the program? Who should we be directing the questions to?

10 A. I guess Mr. Pearce was the one that was more closely involved with the program and the interview that took place. I'm not sure that Pearce was involved initially, but he is certainly the one who has had the continuation of that program for some period of time and is knowledgeable in that area.

DR. DUPRE: That program, just so that I can understand it in terms of the charts you so helpfully made out this morning, was under vocational rehabilitation?

15 THE WITNESS: That's correct.

MR. LASKIN: Q. Let me put another question to you and if you can help me with it, well and good, and if you can't please tell me.

20 One of the briefs submitted to us in our informal stage, from the Energy and Chemical Workers Union, made the point that in a sense the program was misguided because the employees at whom it was directed - J-M employees - were virtually unemployable elsewhere and the brief pointed, as I understood it, number one to the lack of education and so forth of these employees, and number two, to the stigma that these employees carry with them by virtue simply of working at Johns-Manville.

25 Any reaction to that?

30 THE WITNESS: A. I don't think that's a fair assumption. The age was a factor, and again, I go back to the comment that I made earlier - if that individual has invested a large number of years with a company you are not going to force him to participate in a special program, to leave that company and to look elsewhere. It just isn't reasonable.

THE WITNESS: (cont'd.) Why should the man give that up?

5 If I were in that position I certainly would be most reluctant to give it up. Okay, I'm going to make a decision that hey, well, I've been here for twenty-seven years, I've got three more years to go to reach my pension, should I pack it all in now because I might get the disease? If I might get it, I don't think that three years away from it is going to make any difference to me, but that's the decision that the man himself has to make, based on the best guidance that he can seek.

10 Where he's going to get that from is a pretty tough question.

15 DR. MUSTARD: Can I raise a point which is only partly related to the discussion, that has been bothering me all day, and it gets into your disability considerations, etc., and it ties into this area.

20 There is a body of knowledge that says when you label a person as having a condition or a precondition, you substantially change their attitude. Indeed, it is fairly well documented in the literature with which I work. For example, in telling people they've got high blood pressure, even though they do not have any clinical manifestations of the problem.

25 Now, my problem comes up this way. Recognizing that occurs, when a person works in an environment with asbestos fibers and they are told maybe they have a precondition or something like that, through their mind will go a whole cycle of thoughts and 'precondition' may just be a blur because it may be a continuous process...in their own mind, indeed they may be quite right in making that assumption.

30 I would presume that has a substantial change in their attitudes about things, and I would be interested to know if the Board has had the resources, I guess, to look at the impact

5 DR. MUSTARD: (cont'd.) on members of the work force of being labelled with a condition or a precondition in terms of just their attitude in general, and whether in your assessment of what you can do or what they can do, you have a group of experts that can give you advice about the impact of that?

THE WITNESS: I am not aware of any such program. I'm not aware of that consideration.

10 DR. MUSTARD: I felt that is a concern. With a rehabilitation program that becomes a very important consideration.

THE WITNESS: I guess I would go back to Elliott Lake, and that's when the guidelines were originally introduced for Elliott Lake, they talked about an individual having one hundred and twenty WLM's.

15 There is no magic figure that relates to a hundred and twenty WLM's that enables the individual to determine, hey, I'm going to get cancer because I've got a hundred and twenty, because you have people up there who had three hundred, four hundred and more and never got the disease. It's the reaction of the individual to the exposure.

20 But a recent decision was made, okay this guy has got a hundred and twenty WLM's, if he wants to get into the program he can go into the program. And that is where it was introduced.

25 They said, well, maybe this possibility should be expanded to the asbestotic, to the silicotic, give him a chance to move and to possibly...and I emphasize possibly...prevent a disease in the future.

30 DR. MUSTARD: But I guess really your answer to me, however, would indicate, recognizing all that, which is the problem with my professional bias, a very medical mechanistic approach to things, there is a substantial group now also in the professional field of medicine, psychology, who say you must also

5 DR. MUSTARD: (cont'd.) examine the attitudinal effect on people, and I gather that that really hasn't been a major part of the policy framework...

THE WITNESS: No, it hasn't, and I'm not so sure it was there in 1976, or even considered in 1976, and certainly it hasn't been considered up to this point in time.

10 Again, I'm not aware of any other jurisdiction in this country or any other country, which has such a program, which enables us to take these people, if you will, out of exposure employment and try to help them.

15 MR. LASKIN: Q. The impression I have from reading Professor Barth, rightly or wrongly, was at least relatively speaking more people took advantage of the Elliott Lake program. Or to put it in terms of being more successful, I think he didn't really elaborate on what that meant.

THE WITNESS: A. In terms of numbers, I really couldn't say. He certainly has formed the conclusion that it was more successful in Elliott Lake than it was in Johns-Manville.

But again...

20 Q. Do you agree with that?

A. Well, I guess in part you have to have regard for the transient nature of the work force. I think a lot of the work force in Elliott Lake would necessarily gravitate to another work area.

25 Q. That's what I wanted to ask you specifically about, was the quality of the work force different in Elliott Lake?

A. I'm sure that it was. But the mining work force generally is more transient. They move from mine to mine.

30 I mentioned earlier, we talked about the mining registry that we maintain, which shows an individual's work history in the mines through the mechanism of his mining certificate, and

5 A. (cont'd.) it shows his history - two months here, six months there, eight months there - the individual can move from Matawaska to Bancroft to Elliott Lake, and how many different mines did you have in Elliott Lake? They weren't all in one camp. They moved from mine to mine, and it was a much more transient work force, and if they could see any way that they could take advantage of moving, fine.

10 Don't get me wrong, that there's not long-term employees in Elliott Lake. There are. But I think there are more transient employees.

That's just my own opinion rather than based on any hard data.

15 DR. UFFEN: Could I go back...remember a few minutes ago we were talking about whether there was a stigma attached to employees of one particular company or not...my memory may not be exactly right so anybody that wants to help me on this is welcome to.

20 I believe we were told by some of the people involved that they were led to believe that the Workmen's Compensation Board was going to find them jobs. Maybe that's an oversimplification, but we have been told this in the Commission, that an undertaking had been made to find these people jobs.

Is that a fact or not?

25 THE WITNESS: No, that's incorrect. We would attempt to help them in locating employment within their capabilities.

We would certainly try our best to relocate these individuals, no question.

30 DR. UFFEN: Now in the Act, I forget exactly which paragraph it is, but there is in the Act, it provides for assistance provided the individual is able and willing to take vocational retraining.

Were there any people who, under this rehabilitation

DR. UFFEN: (cont'd.) assistance program, who were unwilling to take retraining?

THE WITNESS: Quite a few people.

DR. UFFEN: Quite a few?

THE WITNESS: Yes, didn't. They chose to remain in the employment and not avail themselves of this program.

Like, of the number of people who were interviewed... and again, I would suggest you had better address your questions to Mr. Pearce, the number of people who were interviewed regarding the program and the number of people eventually entered into it was very small.

But a lot of people chose to remain in the employment.

DR. UFFEN: To put it bluntly, was it a flop? A complete and outright flop?

THE WITNESS: As I said before, I think that some of that is purely subjective. If by removing any of these individuals from exposure employment we have succeeded in preventing one case, then the program has to be successful.

DR. UFFEN: Which we will never know.

THE WITNESS: Which you will never know, that's correct.

MR. LASKIN: Q. I wanted to ask you a few questions about the guidelines - not what they themselves say, but rather the process under which they came into being, if you can help us on that.

Can you go back to describe to us what triggered the desire to promulgate these guidelines and what the Board did?

THE WITNESS: A. The original guideline was developed back in the forties, relating to the sintering and calcining operation in nickel refining, and it was a very broad base guideline. We weren't faced with that many cases of

A. (cont'd.) Carcinoma relating to employment.

5 We did have it there so that the guideline was developed in consultation with...I'm guessing, but I think it was Dr. Sutherland at that time, which was the Ministry of Health, who was also a member of the silicosis referee board if I'm not mistaken, and had an expertise in that field. The Board felt that he could develop a guideline.

10 Q. Just stopping you there for a moment. I suppose one of the alternatives, rather than developing a guideline, might have been to trigger some action to have cabinet put the work relationship-disease substance employment into the schedule?

15 A. Even though it may go into the schedule, and you create a presumption where there is the exposure that there is the disease, nonetheless you have to have some criteria to accept that.

20 In other words, if the individual has worked one day in exposure in the calcining operation, and develops the disease, can it be truly related to one day's exposure in a disease that is also prevalent in the general public?

25 I think that creating that assumption isn't necessarily a good one, that you do have to have some type of guideline.

30 As the work progressed, there were more cases that were presented and the adjudicators...and quite frankly I think the medical people, to some degree...were flying by the seat of their pants in the adjudication of some of these claims in the early days, and it was decided that hey, the adjudicators and the medical people need some general guidelines on which to base their decision, and if the individual met those guidelines, then the claim would be accepted. In each of those guidelines you have a guideline that where they don't meet the specific criteria, then the benefit of reasonable doubt applies, having

A. (cont'd.) regard to all of the circumstances.

Now, those guidelines were developed initially for internal use. Eventually, at the request of the people who were involved in these various processes, the guidelines were provided to them. But they are just that - a guideline. They are not etched in stone.

Q. As I understand it, was there not some time in the seventies, dealing with the asbestos-related guidelines - other than whatever we say about asbestosis - was there, as I understand it, a standing committee of the Board appointed to address that subject?

A. There was a committee of the Board appointed to review all of the medical history that was available and all of the claims data that was internally available, all external claims data, etc., and try to develop the guidelines.

Q. Where do I find that committee on any of these organization charts?

A. You wouldn't. Dr. Dupre asked me this morning if the guideline is to be developed, it would be on the basis of consultation between the executive director of the medical services and myself, where you see the disease coming along and you need something as a guideline to help the adjudication staff in making those decisions.

There is no standing committee as such. It would be based on the individual disease as it arises.

I guess if you have a copy of all of the guidelines, I'm not sure of the most recent one, what the date was.

Q. Who within the Board was responsible for ensuring that the task of promulgating a guideline or a draft proposal was made, and who was responsible for farming out the research and so on? Who undertook that task within the Board?

A. I guess it was done at the direction of the

A. (cont'd.) executive director of medical services and the then-executive director of claims services.

5 DR. DUPRE: So these two officials basically would have decided to set up a committee?

THE WITNESS: Yes, sir. The Board would be aware of that committee as a result of a general or ongoing operation...

DR. DUPRE: The corporate board?

10 THE WITNESS: The corporate board.

DR. DUPRE: But the establishment of that committee would basically be a decision by two executive directors?

THE WITNESS: Yes, sir.

MR. LASKIN: Q. Who was on the committee?

15 THE WITNESS: A. It would vary, depending on the guideline that was being developed and the expertise that was required.

Q. Okay. Can we deal with the asbestos guideline, for mesothelioma, etc.?

A. I would have to go back and examine, John, excuse me...

20 Q. That's fine.

A. It was some number of years ago. There would have been representation from the senior level within the claims services division, from the medical services division. It would probably have included the supervisor of the ID and D section, Dr. Stewart, Dr. Dyer, the director of the adjudication branch, possibly one of the managers within the adjudication branch, and perhaps the director of the review branch.

25 Without...that's just going from memory.

Q. I assume Dr. Stewart might be able to help us more specifically as to who the members of the committee were?

30 A. I think that if you want that information we could certainly go back and review the data to see who was on it.

5 Q. All right. And was it left to that committee to determine the manner in which the guideline would be formulated, who would be consulted, what kind of research would be done, and so on and so forth?

A. Yes. It was the committee's determination.

Q. Do you know whether the committee remained in place once the guideline had been formulated?

10 A. No, but I guess that's partly because of change in personnel in the various operating divisions...more so in claims than medical, although I guess there has been a change in the medical area as well. I'm sure in some of these guidelines Dr. Choval was involved in developing some of them. He has since left the Board and is currently in the States.

15 In the claims area there have been at least three different directors within the adjudication branch who would have been involved in the development of some of these guidelines. So that there is a change in personnel, but there is an ongoing review of the guidelines. If any evidence or any information is identified by primarily the medical people, they would certainly recommend that the guidelines be reviewed.

20 I guess as secretary of the board at one point in time, I had a concern that certain cases were being accepted and really didn't meet the existing guidelines, and I suggested that those guidelines should be reviewed. But I guess that's part of the operating procedure of the secretary or the executive director or the director or what have you - hey, you know, we seem to be taking on some cases that don't meet these guidelines, is there a need to revise the guidelines...is the latency period appropriate, is the exposure period appropriate. But there is no hard and fast rule that guideline A is going to be reviewed in three years, or guideline B in five years, or what have you. It's on the basis

A. (cont'd.) of evidence that comes to light within the medical community, primarily.

Q. I take it there is no permanent or fairly fixed body within the WCB who is charged with that responsibility?

A. No, except that the same people are generally fulfilling the same roles and they would be aware of what is going on in the area.

DR. DUPRE: Can I just take it, Mr. McDonald, that the business of devising whether or not to set up or move to devise the guidelines is very much triggered by a felt need that the executive directors of the claims and the medical divisions begin to feel, for some way of simplifying the adjudication of certain classes of claims, and to simply try to accelerate the manner in which these claims can be dealt with fairly?

THE WITNESS: Again though, I would add that some direction comes from the Board in this respect as well. Because as an appeal board and members of the corporate board, they would see cases coming before them that don't necessarily meet the criteria, but they do have merit. They would indicate, look, I think somebody should be having another look at the guideline or the criteria that's being used in this adjudication process.

DR. DUPRE: If we put together my description and your comments, do you have any observations on why apparently there's not yet developed a felt need to develop guidelines with respect to the entitlement of certain classes of partial disability pensions, in terms of their survivors being eligible for benefits?

THE WITNESS: My comment would be that the Act requires that the disability, that death be due to the disability. Until the legislation is changed in that respect, I don't see where you are going to come with a guideline to enable you to adjudicate otherwise than in accordance with the terms of the Act.

DR. DUPRE: I guess, again, if the guideline is

5 DR. DUPRE: (cont'd.) simply meant to perhaps expedite the making of certain decisions, I would have thought that, you know, with respect to cause of death of people who were on partial disability that for example if you had a guideline that, for example, associated one kind of heart failure, right or left, with asbestosis vis a vis another, that that would simply simplify the way in which you could cope with that.

10 THE WITNESS: But I guess I don't see the need for that type of guideline, because...

DR. DUPRE: Because it could be applied automatically?

15 THE WITNESS: ...the adjudicator and the medical people know that if you come up with that diagnosis, that's where you are at, and you have already established entitlement for the disease in the first place.

I wouldn't see the need for it.

20 DR. UFFEN: Could I make sure I understand something here with respect to these guidelines? If the guidelines were established as guidelines on medical advice from within the Board's structure, and then cases started to arrive before the adjudicators and appeals where the guidelines had not been followed exactly, so the question...

THE WITNESS: You mean the case didn't fit the guidelines?

25 DR. UFFEN: The case didn't fit, so the question comes up - maybe it's time to review the guidelines, there is new medical evidence.

But another possible interpretation is that the people who advised the Board on the guidelines are now not heeding their own advice.

30 THE WITNESS: No, because...

DR. UFFEN: Because it's the same people that give the advice to formulate the guidelines as give the medical assessment

DR. UFFEN: (cont'd.) on the individual cases. Have I got it right or wrong?

5 THE WITNESS: You've got it right in part, but I think that...in the guideline for lung cancer, for instance...

DR. UFFEN: Yes, I've got it here.

10 THE WITNESS: ...you are looking for the history of ten years occupational exposure to asbestos - a minimum interval of ten years between the first exposure to asbestos and the occurrence of lung cancer.

There are two or three things which do not meet the guidelines of two, one and two, two, should be individually judged on their own merit having regard to the intensity of exposure and other factors peculiar to the individual case.

15 That, if you will, is an override of the ten years occupational exposure and ten year latency, so that...

DR. UFFEN: It seems very reasonable...

20 THE WITNESS: But if you find a lot that are coming up at a five year period of latency, or five years of exposure, then maybe you should be looking at the guidelines.

But again, you have to keep in mind that the number of these cases that there are in terms of the overall compensation scheme, is pretty small. So to form an epidemiological basis, if you will, for changing the guidelines is pretty tough because of the small cohort that you are working with.

25 DR. UFFEN: I understand that part of it, but it's the procedure that I'm trying to make sure I understand.

30 A group of people, on the best knowledge available to them - medical knowledge coming from epidemiology and elsewhere - set out the guidelines two, one and two, two, and then realizing that it might not always be adequate, there is a two, three that says use good judgement?

THE WITNESS: Right.

5 DR. UFFEN: Now these same people are the ones that referee individual cases, so it's a guideline that says do as you please. If you can't fit two, one and two, two because we are a little out of date, then we use two, three. It's just circular. It justifies the decision of that group.

10 THE WITNESS: No, I guess I don't see it that way because you have more than one body using that guideline and that criteria. You have the claims adjudicator...

DR. UFFEN: He is not medical.

THE WITNESS: No. You have the review branch.

DR. UFFEN: They are not medical.

THE WITNESS: You have the appeals adjudicator.

DR. UFFEN: They are not medical.

15 THE WITNESS: You have the appeal board.

DR. UFFEN: They are not medical.

THE WITNESS: All having regard to the circumstances of the individual case.

DR. UFFEN: Yes, but the evidence in front of them about exposure and latency is of medical origin.

20 Let me put it another way...

THE WITNESS: No, not the exposure, and the latency is usually a matter of fact as to when the individual had the exposure and when the disease developed.

DR. UFFEN: The medical assessment never includes an evaluation of exposure, is that what you are telling me?

25 THE WITNESS: I think that in the last part of that guideline, two, three, you might have an individual who has a very intense exposure. I can give you an example of a silicotic, and usually you are not into the silicosis until you have many, many years of exposure.

30 We had one individual who was working in a very small room, in the manufacture of talc, and he got it with just

THE WITNESS: (cont'd.) barely over two years of exposure. That's got to be a rarity.

5 There is another woman who didn't qualify for benefits because she wasn't a worker. She got it from sniffing Bon Ami. She got a high out of it, but she also got silicosis out of it.

10 DR. UFFEN: Can I come back to my point? I'll put it another way.

15 If the guidelines were established by the Canadian Medical Association, then the implementation of them by the advisory committee on...whatever, I can't remember...chest diseases, would do its job as best it could, but the guidelines would have been set by someone who has no involvement in the individual cases which are being judged.

THE WITNESS: But you have to have the expertise and you have to have the knowledge that will enable you to develop those guidelines.

20 DR. UFFEN: Are you suggesting you couldn't go to the Canadian Medical Association and find people elsewhere than in this particular jurisdiction?

THE WITNESS: If you are going to find them in another jurisdiction, in all probability they have that same contact in the other jurisdiction because of the compensation systems that exist across Canada.

25 DR. UFFEN: Yes, but they wouldn't be involved with the decisions about the individual cases that are coming up. They would be deciding other individual cases in another jurisdiction.

30 THE WITNESS: I don't take argument with your suggestion that there should be some external input to those guidelines. But it's a case of coming up with the people who will offer you the advice with respect to the formulation of those guidelines. I still feel you have an internal need for...a

5 THE WITNESS: (cont'd.) need for internal input in the development of those guidelines. I don't see how you can divorce it because I think there is too much information required.

If you have to...you know, to develop these things takes a great deal of research, if you will, of the existing evidence to do that, and to find someone out there with the expertise, who is prepared to devote the time to this subject, isn't easy.

10 MR. LASKIN: Q. I suppose to pursue Dr. Uffen's point, and perhaps we are getting late, for whose benefit are these guidelines?

15 THE WITNESS: A. The claims adjudicators. That's what they were designed for initially, the claims adjudicators, and they were ultimately published - because of requests, what do you do. And as I said before, to my knowledge we are the only jurisdiction who has developed such guidelines.

But they are primarily for the claims adjudicator, to assist him to determine what he has to gather in order to consider possible entitlement in that claim.

20 Q. But isn't he getting, himself, an opinion from Dr. Stewart as to what he ought to do, and Dr. Stewart is the same person who has had a major input into the guidelines, so that what is the value in, as it were, having Dr. Stewart's opinion formalized in one sense...

25 A. Well, I guess the value is, if you come along and ask me why did you allow this claim, I say to you well, the man had ten years exposure, there is a latency period, and I want to be able to support the reason for the allowance or denial of that claim - hey, this man hasn't been exposure employed for forty years and now he has come up with lung cancer, is it reasonable. No, I really don't think that it is. It doesn't meet any of the
30 criteria for the development of lung cancer as far as any data

A. (cont'd.) we have been able to develop.

5 DR. MUSTARD: Can I focus this a slightly different way, the discussion? Really it's unfair to ask this question of you because it's more appropriate for your medical colleagues, but since you have to decide about a claim, and you have to look at their opinion, how much assessment do nonmedical people give about the degree of uncertainty in relation to the medical evidence that is used?

10 Let me just give you an example of that. My colleagues know very well if you run oral examinations as physicians of young physicians, etc., and just the consistency of examiners, etc., with their experts in their field, in cases you will find that they are not that consistent. There is a variation which is really very well recognized - the uncertainty of both diagnosis and treatment in medicine. And you are in a situation here where your evidence base sometimes is soft because you can't get everything you would like.

15 There are strategies by which professionals can take evidence and give estimates of the probability of something and the limitations on either side, you know - there is a thirty percent probability of this being the case, but indeed we might be out by a factor of twenty, which gives you some idea of the range.

20 My question is, (a) have you ever had your medical advisory people test themselves on the consistency with which they can assess the situation? In other words, what is the error among themselves and the error within themselves, and secondly, has that ever been fed in as sort of a guide in the guidelines to facilitate your interpretations?

25 THE WITNESS: Not to my knowledge.

30 DR. MUSTARD: Has it ever been discussed, the uncertainty question, and what that must mean in difficulty in

DR. MUSTARD: (cont'd.) terms of the application of the guideline?

5 THE WITNESS: You would have to discuss that with the medical people. I am not aware of any such discussion.

DR. MUSTARD: But in a sense they operate it in the guidelines, as I understand it, because there is that judgement question which comes in, which you have to make a wise decision in the face of all the uncertainty.

10 I guess the question that comes up really in terms of Dr. Uffen's point is whether your judgement on the uncertainty principle is subject to, is influenced by the biases by which you go into that particular question, and I don't know the answer to that. You can test it.

15 MR. LASKIN: I'm just wondering, Mr. Chairman, in view of the hour, perhaps where we should go from here. Mr. McDonald has had an awfully long day in the witness stand.

DR. DUPRE: He has indeed, and has certainly been invaluable to me so far, but I have no doubt, Mr. McDonald, that we will be requiring more of your time later this week.

20 However, you may or may not be aware that, as I understand it, Dr. Ritchie is only available to come to us tomorrow, so counsel, at this point, what are we looking at? A situation where we would have Dr. Ritchie tomorrow and perhaps ask Mr. McDonald to come back on Thursday, or what?

25 MR. LASKIN: No. It's indeed true that Dr. Ritchie is this week only available tomorrow, and I have scheduled him to start at nine-thirty.

Now, perhaps we can ask Mr. McDonald as to what his own convenience and availability is.

30 THE WITNESS: I'm sorry, I don't have my calendar with me, but I will be available on the call of the Commission for the balance of the week.

MR. LASKIN: That's very kind of you.

THE WITNESS: So give me some notification, I will attempt to get here as soon as I possibly can.

MR. LASKIN: It seems to me it would be sensible, subject to the break for Dr. Ritchie, to complete Mr. McDonald's testimony, if we could, before we go to another witness.

Mr. McDonald is good enough to make himself available. Perhaps we could see how we go with Dr. Ritchie and we could communicate with you at the Board, Mr. McDonald.

DR. DUPRE: I think for Mr. McDonald's convenience it would be safe to forecast that we will be at least half of tomorrow with Dr. Ritchie, so Mr. McDonald certainly can count on the morning off.

THE WITNESS: Not really.

DR. DUPRE: On the morning off from having us on your ballast, Mr. McDonald, not for any other reason, and we could certainly, I think, probably let your office know by noon whether you can't have us off your back in the afternoon. Is that all right?

THE WITNESS: That's fine.

DR. DUPRE: Well, may I simply say that we rise now until nine-thirty tomorrow morning? Thank you very much.

THE INQUIRY ADJOURNED

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Edwina Macht
EDWINA MACHT

